IN THE

# Supreme Court of the United States

October Term, 1977.

No. 77-131

DELAWARE STATE BOARD OF EDUCATION, et al.,
*Petitioners,*

*v.*

BRENDA EVANS, et al.,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Petitioners respectfully request that a writ of certiorari issue from this Court to review the judgment of the United States Court of Appeals for the Third Circuit in the above-encaptioned cause.

## OPINION BELOW.

The opinions of the Court of Appeals for the Third Circuit are not yet reported. They are set out as Appendix A hereto at pp. A1 to A41. The opinions of the United States District Court for the District of Delaware are reported at 416 F. Supp. 328 (1976). They are set out as Appendix B hereto at pp. A42 to A112.

## JURISDICTION.

The opinion of the United States Court of Appeals was filed on May 18, 1977. This Court's jurisdiction is invoked pursuant to 28 U. S. C. § 1254.

## QUESTIONS PRESENTED.

1. Can an interdistrict remedy in a school desegregation case be predicated on alleged interdistrict constitutional violations unsupported by findings of discriminatory or segregatory intent or in the face of a finding of no segregatory or discriminatory intent?

2. Can an interdistrict remedy in a school desegregation case be ordered in the absence of any proof of segregatory effect of the alleged interdistrict violations?

3. Does a summary per curiam affirmance by this Court of an interlocutory order establish the "law of the case" as to all discrete questions that might have been resolved or only as to those issues that were necessarily resolved by the judgment?



## STATEMENT.

The efforts of petitioners to secure a review on the merits of the judgment of the trial court—which compels interdistrict relief in a school desegregation case in the absence of any identified interdistrict violation and in the absence of evidence of any discriminatory or segregatory effect—is reminiscent of the procedures described by Franz Kafka in *The Trial* and *The Castle*. Here, as there, the wrongs alleged to have been committed by the defendants have never been defined and, here as there, no matter what appellate route was chosen it was held to be inappropriate for securing a substantive decision.

This action was commenced in July of 1971, when a petition was filed by a group of individuals alleged to represent a class of black students attending public schools in Wilmington.[1] The action was not filed as a new law suit. It purported to invoke the continuing jurisdiction of the trial court in a case which had begun in 1956 under the rubric of *Evans v. Buchanan* on the complaint of black students in a rural school district in southern Delaware. In that case, additional plaintiffs from other school districts in southern Delaware were allowed to intervene and the case proceeded as a class action purporting to cover the entire state.

The 1956 litigation culminated in a 1961 judgment which approved a statewide plan of desegregation. *Evans v. Buchanan*, 195 F. Supp. 321 (D. Del. 1961). That plan provided for the immediate admission of black students to previously white schools. It also provided for the

1. A proper class was never, in fact, defined in accordance with the requirements of F. R. C. P. 23(c)(1). Only upon final judgment did the trial court purport to make the necessary findings required by the Rule, having previously denied intervention by parents of black Wilmington children who would have advocated retention of neighborhood schools.

elimination of all dual school systems in this State and the establishment in their place of unitary school districts.

Long before the 1961 decision, the Wilmington school district had commenced desegregation. Indeed, the Court of Appeals for the Third Circuit, before the 1961 judgment in *Evans v. Buchanan*, noted the progress of the schools of Delaware and particularly of New Castle County, including Wilmington, toward integration. See *Evans v. Buchanan*, 256 F. 2d 688, 690 (3d Cir. 1958); *Evans v. Ennis*, 281 F. 2d 385, 393 (3d Cir. 1961). The Delaware problem of the remnants of segregation was not in New Castle County, but only in some of the rural southern communities.

After the 1961 decision, except for a dispute about attendance zones in one rural New Castle County school district in 1962, *Evans v. Buchanan*, 207 F. Supp. 820 (D. Del. 1962), the case lay dormant until July, 1971, when the instant case was instituted. Meanwhile the Department of Health, Education, and Welfare had commended the State Board as having effected the eradication of the dual system in Delaware and as the first of the Southern or Border States to have done so. See 393 F. Supp. at 451.

In the interim between the 1956 law suit and its 1971 revival, the demographic makeup of Wilmington, like that of almost every American central city, was substantially changed by a large-scale middle-class migration to the suburbs. The racial composition of the Wilmington school population, because of this movement, changed from majority white to majority black. It is this fact that underlies the basic complaint of the plaintiffs. It also explains why Wilmington, the alleged primary transgressor, joined with the plaintiffs to seek amelioration of segregation in



Wilmington by demanding access to the white students and the schools of the surrounding areas.

On the facts alleged in the complaint, the case is an exact duplicate of that which was brought by the same real party in interest in Richmond, *Bradley v. School Board of Richmond*, 462 F. 2d 1058 (4th Cir. 1972), *aff'd by equally divided Court*, 412 U. S. 92 (1973), and in Detroit, *Milliken v. Bradley*, 418 U. S. 717 (1974). The findings of fact by the trial court here and those in *Detroit* and *Richmond* are also duplicative. The only thing that distinguishes the *Detroit* and *Richmond* cases from this one is the result, despite the fact that the intervening decisions of this Court have buttressed rather than diminished the position of the petitioner in this case.

A three-judge court, after hearings, purported to find the vestiges of de jure segregation within the Wilmington District and ordered the parties to file desegregation plans, both interdistrict and intradistrict, for the court's consideration. 379 F. Supp. 1218 (D. Del. 1974). When this Court rendered its decision in *Milliken v. Bradley, supra* the three-judge court allowed the intervention of the suburban school districts, theretofore denied, but adhered to its pre-*Milliken* decision, on the basis of eight alleged constitutional violations. 393 F. Supp. 428 (D. Del. 1975).

The eight alleged violations were succinctly stated by the three dissenting judges in the Court of Appeals for the Third Circuit this way:

> . . . 1. the enactment of the Educational Advancement Act of 1968 [EAA], 2. the location of public housing projects, 3. state subsidies for the interdistrict transportation of students attending private schools, 4. the establishment by the Wilmington school board of optional attendance zones, 5. the recordation of deeds containing racially restrictive covenants, 6. por-

> tions of the Federal Housing Administration's mortgage underwriting manual, 7. portions of the Delaware Real Estate Commission handbook, and 8. the interdistrict transportation of students attending all-black or all-white schools prior to *Brown v. Board of Education*, 347 U. S. 483 (1954). [A27-A28]

The trial court made no finding that any of the alleged violations took place pursuant to a "racially discriminatory intent or purpose," as required by this Court. *Dayton Board of Education v. Brinkman*, No. 76-539, 45 U. S. L. W. 4910 (27 June 1977); *Washington v. Davis*, 426 U. S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, — U. S. —, 97 S. Ct. 555 (1977). As to the only alleged constitutional violation that all members of the Third Circuit *en banc* panel thought to have been reviewed by this Court, the EAA, the trial court made a specific finding that it was not enacted with "a racially discriminatory intent or purpose." Thus, the trial court said:

> We cannot conclude, as plaintiffs contend, that the provisions excluding the Wilmington District from school reorganization were purposefully racially discriminatory. To be sure, all legislators in Delaware in 1968 knew that Wilmington had a large black population, and most legislators may have known that the Wilmington School District was predominantly black. On the other hand, the focus of the legislators' concern in developing the consolidation provisions of the Educational Advancement Act was on small, weak, ineffective school districts, and while the effectiveness of schooling in Wilmington at this time has been disputed, it is clear that Wilmington had larger staffs and better programs than many Delaware school districts.



> Moreover, Wilmington had historically been treated distinctively in Delaware education, and there is evidence that its representatives were unwilling to forego certain aspects of this special treatment. No language in the provisions at issue makes any reference to race, nor evidently, did the legislative debates over the Act contain any reference to race. Finally, all Wilmington legislators, black and white, voted for the Educational Advancement Act. In short, the record does not demonstrate that a significant purpose of the Educational Advancement Act was to foster or perpetuate discrimination through school reorganization. [393 F. Supp. at 439.]

The trial court of three judges, issued its interlocutory order directing the defendant to submit alternative intradistrict and interdistrict desegregation plans and enjoining the enforcement of the Educational Advancement Act of 1968, 14 Del. D. § 1004(c)(2) and § 1004(c)(4). Since that statute had expired by its terms in 1968, the sole function of the injunction against the statute was to permit proposed interdistrict plans to provide for the joinder of Wilmington or some part thereof with an adjacent district or districts. The attack on the constitutionality of that statute also afforded the sole excuse for the utilization of a three-judge court.

Petitioner felt obliged to appeal to this Court for review of the three-judge court judgment lest it be deemed to waive its rights to preserve these issues for ultimate adjudication on the final judgment. This Court enigmatically "affirmed" the trial court's judgment, *Evans v. Buchanan*, 423 U. S. 963 (1975), leaving all parties, as well as three Justices of this Court, in the dark as to the meaning of that affirmance. What was clear was that the trial court was expected to proceed to the hearings on the

remedy phase of the lawsuit. It has since become clear that it was inappropriate for the three-judge court rather than a single district judge to proceed to judgment, as the dismissal of petitioner's appeal to this Court from the final judgment of the three-judge court makes apparent. *State Board of Education v. Evans,* — U. S. —, 45 U. S. L. W. 3394 (29 Nov. 1976).

The three-judge court held hearings on remedy and entered its final judgment, providing that eleven of the twelve school districts in New Castle County be collapsed into a single super-district covering more than 250 square miles of urban, suburban, and rural territory and including more than 60% of the total public school pupils of the State of Delaware. The political entities which had previously governed in this area were to be dissolved and with them their individualized programs of administration, finance, and curriculum. In addition, the trial court ordered that pupil assignment within the mammoth new school district conform to a fixed racial quota within each grade in each school building. It was from this judgment that appeal was taken to the Court of Appeals for the Third Circuit. Except for banning the use of the quota, which it held inconsistent with this Court's judgments in *Swann v. Board of Education,* 402 U. S. 1, 24 (1971), and *Milliken v. Bradley,* 418 U. S. 717, 741 (1974), the Third Circuit, divided four-to-three, proceeded to affirm the judgment of the trial court.

At the same time that it affirmed the judgment, however, it announced that the proper standard for a remedy was that it be confined to a cure of the particular violations that had occurred.

> A court is not at liberty to issue orders merely because it believes they will produce a result which the court finds desirable. The existence of a constitutional violation does not authorize a court to seek to bring about conditions that never would have existed even if there had been no constitutional violation. The remedy for a constitutional violation may not be designed to eliminate arguably undesirable states of affairs caused by purely private conduct (*de facto* segregation) or by state conduct which has in it no element of racial discrimination. . . .
>
> The task of a remedial decree in a school desegregation case is simply to correct the constitutional violation and to eradicate its effects. . . . [A16-A17]



But the Third Circuit refused to inform the parties or the trial court what those violations were, on the ground that it was barred from doing so because of "the law of the case" as established by this Court's per curiam affirmance on the appeal from the interlocutory judgment. 423 U. S. 963 (1975). It ordered the defendant to report to the trial court within sixty days the steps taken to meet the requirements of the trial court judgment.

The holding of the Court of Appeals on the substantive issues can best be stated in its own words:

> In cases of summary adjudication, of course, it is not always crystal clear what exactly was adjudicated by the Supreme Court, see *Super Tire Engineering Co. v. McCorkle,* — F. 2d — (3d Cir. No. 76-1869, Feb. 24, 1977, Slip Op. at 7), but in this case we conclude that the Supreme Court affirmed the finding of one or more inter-district constitutional violations. The district court found a constitutional violation and ordered the parties to submit both Wilmington-only and inter-district plans. Thus, in exercising its review function, the Supreme Court perforce con-

> sidered both the constitutional violation and its inter-district character. Had the Court disapproved of these lower court findings, it would either have found no constitutional violation, thereby precluding the submission of *any* plan, or alternatively, it would have prohibited the filing of an inter-district plan. [A13]

This conclusion is, of course, a non-sequitur, both because it assumes without basis that this Court could and did consider any question other than the proper exercise of the trial court's discretion on the interlocutory injunction. Not only was this reading logically improper, however, it also created a quandary which the Third Circuit four-man majority acknowledged without resolving:

> The dissent urges that we should determine which of the eight violations found by the district court were affirmed or not affirmed by the Supreme Court. In view of the doctrine of the law of the case and the very brief order by the Supreme Court, this would become a highly speculative exercise, if indeed, this court has power to attempt a modification of the Supreme Court's judgment. If the defendants believe that some of the eight alleged violations were not affirmed, they should take, or perhaps previously should have taken, appropriate steps to obtain review of this matter, or a clarification by the Supreme Court. [*Ibid.*]

The majority then went on to hold "that one or more inter-district constitutional violations were found by the district court and affirmed by the Supreme Court. Those rulings [whatever they may be] now constitute the law of the case." [A14]



The difficulties created by the majority's word game were clearly elucidated in the opinion written for the three dissenting judges:

> I must confess that if I were a Delaware official charged with desegregating the schools of northern New Castle County "in accordance with the Opinion of the Court of Appeals for the Third Circuit," I would not know where to begin.
>
> The majority opinion correctly observes that the remedy in this case must return the "school system and its students . . ., as nearly as possible, to the position they would have been in *but for the constitutional violations that have been found.*" However, the majority opinion does not identify those inter-district violations which have been found in this case and which require a remedy. It interprets the Supreme Court's summary affirmance, *Buchanan v. Evans*, 423 U. S. 963 (1975), to mean that "one or more interdistrict constitutional violations" occurred.
>
> . . .
>
> The majority does not reveal which of these violations it believed the Supreme Court affirmed. Nor does it explain what has become of the remaining violations. If those violations were not affirmed by the Supreme Court, then obviously they are before this Court in this appeal. The majority, however, has failed to address this question. I do not understand how the Delaware officials can possibly devise a plan to remedy the continuing effects of past interdistrict violations when the majority has failed to disclose the identity of the violations which the Supreme Court affirmed.
>
> Even if it is assumed *arguendo* that *all* eight interdistrict violations have been properly established,

the Delaware officials would still be unable to determine what "desegregation" means in the context of this case until the courts determine what the continuing effects of those violations are. . . . In this case, however, the district court never attempted to ascertain what the racial composition of the schools of northern New Castle County would be but for the constitutional violations which it identified. . . .

. . . Since the majority opinion states the Supreme Court affirmed the existence of "one or more "interdistrict violations, the defendants could quite reasonably interpret the modified order and the majority opinion to mean that only one violation was affirmed by the Supreme Court and that only that violation need be remedied. The defendants could argue—as I have (see part II A *infra*)—that the violation affirmed by the Supreme Court was the enactment of the Educational Advancement Act. Since portions of the EAA were held to be discriminatory because they precluded the State Board of Education from *considering* the desirability of consolidating all or part of Wilmington with nearby district, the defendants could quite reasonably take the position that the continuing effects of this violation can be remedied simply by requiring the State Board to *consider* whether it would be educationally desirable to consolidate Wilmington with nearby districts and by empowering the State Board to effect such conclusions if it determines that they are beneficial. . . . [A26-A31]

It is from the judgment of the divided Court of Appeals for the Third Circuit, sitting *en banc*, that this petition for certiorari is taken.



## REASONS FOR GRANTING THE WRIT.

### I. The Decision Below Is in Direct Conflict With Decisions of This Court and Those of Other Courts of Appeals, Particularly That of the Fourth Circuit in *Bradley v. School Board of Richmond*, on the Questions of What Constitutes an Interdistrict Constitutional Violation in a School Desegregation Case and What Constitutes an Appropriate Remedy for Such Constitutional Violation.

#### A. Absence of Interdistrict Violations.

Of the eight so-called interdistrict violations "found" by the trial court in this case, all eight had their analogues in the *Richmond* case and seven of the eight had their analogues in the *Detroit* case. First, is the alleged state legislative action inhibiting desegregation. In *Richmond*, the trial court found that the statute precluding joinder of school districts was passed with intent to frustrate desegregation, 338 F. Supp. at 122-23, whereas here, the court found that there was no element of segregatory or discriminatory intent on the part of the legislature. 393 F. Supp. at 439, quoted *supra* at pp. 12-13. And, as Mr. Justice White and Mr. Justice Marshall pointed out, if Michigan did not enact similar laws inhibiting school district consolidation, it was responsible for a statute inhibiting desegregation in Detroit. See 418 U.S. at 770, 791.

The so-called housing violations, consisting of location of housing projects, alleged recordation of deeds with racially restrictive covenants, FHA mortgage limitations, and real estate brokers actions, are all found in all three cases, with the evidence in *Richmond* far stronger for the plaintiffs than any adduced in this case. See 338 F. Supp. at 67 (Richmond). In *Detroit*, the court found: "While

the racially unrestricted choice of black persons and economic facts may have played some part in the development of this pattern of residential segregation, it is, in the main, the result of past and present practices and customs of racial discrimination, both public and private, which have and do restrict the housing opportunities of black people. On the record there can be no other finding". 338 F. Supp. at 582.

In the interim, this Court has ruled that failure to provide low cost housing which may have the effect of excluding minorities from suburban housing, in the absence of proof of racial motivation, does not constitute a constitutional violation. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, — U. S. —, 97 S. Ct. 555 (1977); cf. *James v. Valtierra*, 402 U. S. 137 (1971).

State subsidies for interdistrict transportation of students attending private school and the utilization of optional attendance zones within the central city were also present in *Detroit* and *Richmond*. See 338 F. Supp. 587, 588 (*Detroit*); 338 F. Supp. 159, 184 (*Richmond*). The latter, of course, as this Court has held, is no justification for an interdistrict remedy. "When the schools of only one district have been affected, there is no constitutional power in the courts to decree relief balancing the racial composition of that district's schools with those of surrounding districts." *Milliken*, 418 U. S. at 749.

The only attribute shared by *Richmond* and *Wilmington* but not *Detroit* was the finding that before *Brown v. Board of Education*, 347 U. S. 483 (1954), both Delaware and Virginia engaged in segregatory transportation to maintain a dual school system. In Michigan, such *de jure* segregation was not recognized before the *Milliken* case. But the pre-*Brown* school segregation bears no causal relationship to the existent school systems or their operations. There is not and could not be any showing of a connection between this ancient history—the school districts of the State of Delaware have long since been desegregated, 393 F. Supp. at 437—and the proportional growth of the black population in the Wilmington schools, which purports to be the constitutional violation to be cured.



Unless this Court is prepared to condone the proposition that the people of Delaware live under a different Constitution than those of Michigan and Virginia, it is incumbent upon it to grant review and reverse the decision below.

**B. Absence of Segregatory Intent.**

Since the decision of the trial court sought to be reviewed here, this Court has made it abundantly clear that there can be no constitutional violation of the Fourteenth Amendment's inhibitions on segregation in the absence of purpose or intent to segregate. *Dayton Board of Education v. Brinkman*, 45 U. S. L. W. 4910 (27 June 1977); *Washington v. Davis*, 426 U. S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, — U. S. —, 97 S. Ct. 555 (1977); see also *Omaha School District v. United States*, 45 U. S. L. W. 3850 (29 June 1977); *Brennan v. Armstrong*, 45 U. S. L. W. 3850 (29 June 1977); *Austin Independent School District v. United States*, — U. S. —, 97 S. Ct. 517 (1976). There was no finding of any such intent with regard to any of the violations charged by the trial court. With reference to what has been considered the primary violation, the enactment of the Educational Advancement Act, the trial court specifically found that there was no such purpose or intent. 393 F. Supp. at 439, quoted *supra* at pp. 12-13.

The Court of Appeals for the Third Circuit refused to consider the question of this conflict between the trial court's judgment and the decisions of this Court, on the ground that it was pretermitted by this Court's per curiam ruling on the appeal from the interlocutory judgment. [A13]. Thus, despite this Court's statement of "the principle that a court is to apply the law in effect at the time of its decision," *Bradley v. Richmond School Board,* 416 U. S. 696, 711 (1973), the Third Circuit affirmed a judgment totally at odds with this Court's recent pronouncements as to the governing law. Once again it would appear that the Constitution means one thing in Texas, Illinois, the District of Columbia, Ohio, Nebraska and Wisconsin, but something else again in the State of Delaware.

**C. Constitutional Impropriety of Remedy.**

The decision below is also in conflict with the decisions of this Court on the propriety of the remedy that it endorsed. Whatever the merits of the Third Circuit's opinion on the law of the case as to the alleged violations, there can be no question that the questions as to the propriety of the remedy imposed were not at issue when the appeal to this court was taken from the trial court's interlocutory order. Although the Third Circuit majority mouthed the right words, that a remedy in a school desegregation case must cure the particular constitutional violation found to exist, it refused to state what particular constitutional violations here called for the remedy, and it refused to require any evidence to show that the so-called constitutional violations had any segregatory effect that called for remedy. Instead, it simply puts its approval on a trial court remedy that patently flies in the face of this Court's rulings. That remedy called for the total



restructuring of the eleven local government units brought under the court's jurisdiction, by ordering the destruction of each of them and the replacement by a single governmental unit designed by the trial court.

The Court of Appeals for the Third Circuit was, therefore, in conflict with the decisions of this Court as to the improper scope of the remedy—the destruction of the eleven school districts in New Castle County and the creation of a single superdistrict—and in its failure to command proof that the remedy imposed was in fact directed to the alleged constitutional violations committed. Its error is made patent by the most recent decisions of this Court that were concerned with these very questions. Thus, in *Dayton Board of Education v. Brinkman,* 45 U. S. L. W. 4910, 4911, 4914 (27 June 1977), this Court said:

> . . . our cases have just as firmly recognized that local autonomy of school districts is a vital tradition. *Milliken v. Bradley,* 418 U. S. 717, 741-742 (1974); *San Antonio School District v. Rodriguez,* 411 U. S. 1, 50 (1973); *Wright v. Council of City of Emporia,* [407 U. S. 451,] at 469 [1972]. It is for this reason that the case for displacement of the local authorities by a federal court in a school desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles. Cf. *Pasadena City Board of Education v. Spangler,* 427 U. S. 421 (1976).
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> • • •

The duty of both the District Court and of the Court of Appeals in a case such as this, where mandatory segregation has long since ceased, is to first determine whether there was any action in the conduct of the business of the school board which was intended to, and did in fact, discriminate against minor-

ity pupils, teachers, or staff. *Washington v. Davis, supra.* . . . If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregatory effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy.

We realize that this is a difficult task, and that it is much easier for a reviewing court to fault ambiguous phrases such as "cumulative violations" than it is for the finder of fact to make the complex factual determinations in the first instance. Nonetheless, that is what the Constitution and our cases call for, and that is what must be done in this case.

There was no showing here of any interdistrict segregatory effects of any of the charged violations and "the necessary predicate" for such "federal judicial interference with local government entities" is totally absent. Once again, we submit that the people of Delaware are entitled to be governed by the same constitutional principles that the Court has announced to be applicable in other jurisdictions.



**II. The Decision Below Erroneously Decided an Extraordinarily Important Question of Federal Judicial Administration in Ruling That—Because of the Doctrine of Law of the Case—a Summary Order of Affirmance of an Interlocutory Judgment Foreclosed All Issues, However Discrete, That This Court May Have Addressed, and Not Merely Those Issues That It Necessarily Addressed.**

With this Court committed, by necessity, to the disposition of more and more cases by summary action, it is of great importance that the Court delineate, for the guidance of the lower federal courts, the principles of stare decisis, res judicata, and law of the case applicable to such summary dispositions.

The judgment of this Court in *Evans v. Buchanan*, 423 U. S. 963 (1975), simply "affirmed" a three-judge court order that commanded the parties to provide the trial court with alternative intradistrict and interdistrict desegregation plans and enjoined the defendants "from relying upon those provisions of the Educational Advancement Act" that forbade consideration of consolidation of Wilmington and other school districts. [A113]. The Court of Appeals for the Third Circuit, because it would not engage in what it called "a highly speculative exercise" of determining what this Court held by its summary affirmance, chose to give the affirmance the broadest possible reading as to the issues it foreclosed. [A13]. This was inconsistent with this Court's statements about the doctrine of law of the case and has frustrated petitioner's right to any appellate review on the merits of a palpably erroneous constitutional decision.

As this Court said in *F. C. C. v. Pottsville Broadcasting Co.*, 309 U. S. 134, 140-41 (1940):

> The Court of Appeals invoked against the Commission the familiar doctrine that a lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which the mandate has laid to rest. . . . That proposition is indisputable, but it does not tell us what issues are laid to rest.

Cf. *Mandel v. Bradley*, 45 U. S. L. W. 4701 (16 June 1977). *Sprague v. Ticonic National Bank*, 307 U. S. 161, 168-69 (1939).

The proper doctrine, ignored or rejected by the Third Circuit, is that the law of the case doctrine provides foreclosure only of those issues actually resolved. Its judgment, therefore, is in conflict, *inter alia*, with the decisions of the Fifth and Second Circuits. Thus, in *Terrell v. Household Goods Carriers Bureau*, 494 F. 2d 16, 19 (5th Cir. 1974), the Fifth Circuit said:

> . . . the law of the case rule applies only to issues that were decided, and "does not include determination of all questions which are within the issues of the case and which, therefore, might not have been decided.

The Second Circuit, in reliance on the decisions of this Court in *Sprague v. Ticonic National Bank*, 307 U. S. 161 (1939); *Ex parte Union Steamboat Co.*, 178 U. S. 317 (1900); *In re Sanford Fork & Tool Co.*, 160 U. S. 247 (1895), said in *Bance Nacional de Cuba v. Farr*, 383 F. 2d 166, 177 (2d Cir. 1967): "Of course it [the law of the case] does not apply to matters left open by the mandate."



This Court has made clear the narrow scope of its review on such an appeal as was taken here in *Evans v. Buchanan*, 423 U. S. 963 (1975). "On appeal from the granting or refusal of an interlocutory injunction our inquiry is limited to the question whether the court abused its discretion." *United States v. Corrick*, 298 U. S. 435, 437-38 (1936). And in *Mayo v. Lakeland Highlands Can Co.*, 309 U. S. 310, 316 (1942), this Court stated:

> The question before it was not whether the act was constitutional or unconstitutional; was not whether the Commission had complied with the act, if valid, but was whether the showing made raised serious questions, under the federal Constitution and the state law, and declared that enforcement of the act, pending final hearings, would inflict irreparable damage upon the complainants.

Thus, the ruling by this Court, in 423 U. S., was not necessarily a decision on any of the substantive issues proferred but only on the scope of the discretion of the trial court in ordering the production by the parties of both intradistrict and interdistrict plans, including an injunction against reliance, in the preparation of those plans, on the terms of the Educational Advancement Act, which had by its terms expired in 1968.

It is, moreover, established law that where a party asserts issue preclusion by reason of prior adjudication, the burden is on the asserting party to show what issues had in fact been foreclosed. That burden was not even addressed no less met by the respondents here. And the failure of the Court of Appeals for the Third Circuit to impose that burden put it in conflict with many other circuits. See, *e.g.*, *Bryson v. Guarantee Reserve Life Ins. Co.*, 520 F. 2d 563, 566 (8th Cir. 1975); *United States*

*v. Friedland,* 391 F. 2d 378, 382 (2d Cir. 1968); *United States v. Feinberg,* 383 F. 2d 60, 71 (2d Cir. 1967); *McNellis v. First Federal Savings & Loan Ass'n.,* 364 F. 2d 251, 257, n. 8 (2d Cir. 1966); *United States v. Burch,* 294 F. 2d 1 (5th Cir. 1961); *Spilker v. Hankin,* 188 F. 2d 35 (D. C. Cir. 1951); *National Lead Co. v. Nulsen,* 131 F. 2d 51 (8th Cir. 1942).

Thus, the Third Circuit foreclosed argument on the primary substantive issues of this case by an inappropriate ruling on the law of the case which was in conflict with the decisions of this Court and those of other circuits. The failure of petitioner to secure a review on the merits of this controversy verges on a deprivation of due process of law which calls for correction here.



## CONCLUSION.

For the reasons heretofore stated, this Court should grant the petition for a writ of certiorari, treat the merits of the controversy that has riven the State of Delaware for so long without any review of the merits of the case, and reverse the judgment below.

Respectfully submitted,

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# APPENDICES

**APPENDIX A.**

# United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 76-2103/2107

BRENDA EVANS, ET AL.
LILLIAN RICHARDSON
WILBUR R. CARR, SR.
CLIFTON LEWIS
JEANNE Q. LEWIS,

*Plaintiffs*

BOARD OF PUBLIC EDUCATION
OF THE CITY OF WILMINGTON,

*Intervening Plaintiff*

*v.*

MADELINE BUCHANAN, ET AL.
ROBERT H. McBRIDE
ELISE GROSSMAN
JOSEPH J. CROWLEY
WILLIAM E. SPENCE
CLYDE BISHOP
RICHARD M. FARMER,
constituting all the members of the State Board
of Education of the State of Delaware,

*Defendants*

ALEXIS I. DUPONT,
ALFRED I. DUPONT,
APPOQUINIMINK,
CLAYMONT, CONRAD,
MARSHALLTON-McKEAN,-MT. PLEASANT,
NEW CASTLE-GUNNING BEDFORD
NEWARK and STANTON SCHOOL DISTRICTS,
DELAWARR SCHOOL DISTRICT,

*Intervening Defendants*

STATE BOARD OF EDUCATION,
*Appellant in No. 76-2103*

NEWARK SCHOOL DISTRICT,
*Appellant in No. 76-2104*

NEW CASTLE-GUNNING BEDFORD SCHOOL DISTRICT,
*Appellant in No. 76-2105*

CLAYMONT SCHOOL DISTRICT and STANTON SCHOOL DISTRICT,
*Appellant in No. 76-2106*

MARSHALLTON-McKEAN SCHOOL DISTRICT,
*Appellant in No. 76-2107*

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

---

(D. C. Civil Nos. 1816-1822)

---

Present: VAN DUSEN, ALDISERT, ADAMS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*.

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**Judgment**

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These causes came on to be heard on the records from the United States District Court for the District of Delaware and were argued by counsel on March 30, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Dis-



trict Court filed June 15, 1976, be, and the same is hereby affirmed as modified, in accordance with the opinion of this Court, and the causes are remanded to the said District Court for the entry of judgment as set forth in the opinion of this Court. Costs taxed against appellants. The mandate shall issue forthwith, also in accordance with the opinion of this Court.

ATTEST:

THOMAS F. QUINN
Clerk

May 18, 1977

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 76-2103/2107

---

BRENDA EVANS, ET AL.
LILLIAN RICHARDSON
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CLIFTON LEWIS
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ROBERT H. McBRIDE
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MARSHALLTON-McKEAN,-MT. PLEASANT,
NEW CASTLE-GUNNING BEDFORD
NEWARK and STANTON SCHOOL DISTRICTS,
DELAWARR SCHOOL DISTRICT,

*Intervening Defendants*



STATE BOARD OF EDUCATION,
*Appellant in No. 76-2103*

NEWARK SCHOOL DISTRICT,
*Appellant in No. 76-2104*

NEW CASTLE-GUNNING BEDFORD
SCHOOL DISTRICT,
*Appellant in No. 76-2105*

CLAYMONT SCHOOL DISTRICT
and STANTON SCHOOL DISTRICT,
*Appellant in No. 76-2106*

MARSHALLTON-McKEAN SCHOOL
DISTRICT,
*Appellant in No. 76-2107*

---

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

---

(D. C. Civil Nos. 1816-1822)

---

Argued March 30, 1977

Before: VAN DUSEN, ALDISERT, ADAMS, ROSENN, HUNTER,
WEIS and GARTH, *Circuit Judges*.

---

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**Opinion of the Court**

(Filed May 18, 1977)

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ALDISERT, *Circuit Judge.*

The major question presented in this review of a three-judge court's judgment ordering the Delaware Board of Education to desegregate its school system is the propriety of the court's inter-district remedy. As hereinafter modified, the district court's judgment will be affirmed.

The present appeal is, we trust, the final chapter in an extensive series of proceedings initiated twenty years ago "to eliminate the *de jure* segregation in Delaware schools," *Evans v. Buchanan,* 393 F. Supp. 428, 430 (D. Del. 1975), and to effectuate "a transition to a racially nondiscriminatory school system" as required by *Brown v. Board of*

*Education (Brown II)*, 349 U. S. 294, 301 (1955).[1] A three-judge court was convened in 1971 in response to the plaintiffs' concern that Delaware's Educational Advancement Act of 1968, which gave the State Board of Education the power to reorganize existing school districts, 14 DEL. C. § 1001, but excluded the Wilmington school district from reorganization, *see id.* §§ 1004(c)(2) and (4), 1005, 1021, 1026(a), offended the principles of *Brown*.

In its initial opinion, *Evans v. Buchanan*, 379 F. Supp. 1218 (D. Del. 1974), the court concluded that "segregated schooling in Wilmington has never been eliminated and that there still exists a dual school system," *id.* at 1223, and, accordingly, ordered the State Board of Education to submit plans to remedy existing segregation. *Id.* at 1224. The court postponed the date set for submission of the plans, however, after the Supreme Court issued its opinion in *Milliken v. Bradley*, 418 U. S. 717 (1974). In its 1975 deliberations, having invited all affected school districts to present evidence on all issues before the court, and applying *Milliken* standards to the record evidence thus adduced, the court found significant inter-district, *de jure* segregation in New Castle County. *Evans v. Buchanan*, 393 F. Supp. 430, 431-32, 438, 445, 447 (D. Del. 1975). At this time, the court held unconstitutional those provisions of Delaware's Educational Advancement Act which excluded Wilmington from eligibility for reorganization, and again ordered submission of both Wilmington-only and inter-district plans to remedy the inter-district segregation. *Id.* at 447. The State Board of Education and the intervening suburban school districts (except DeLaWarr) appealed this judgment to the Supreme Court pursuant to 28 U. S. C. § 1253. On November 17, 1975, the Supreme

1. For a comprehensive history of this litigation, *see Evans v. Buchanan*, 379 F. Supp. 1218, 1220-21 (D. Del. 1974).



Court summarily affirmed the district court. *Buchanan v. Evans*, 423 U. S. 963 (1975).

On May 19, 1976, after three weeks of evidentiary hearings on the plans submitted by the parties, the district court reiterated its finding of an inter-district violation: "We establish here only that the remedy which we order may include the suburban districts, because their existence and their actions were part of the violations which lead to the remedy." *Evans v. Buchanan*, 416 F. Supp. 328, 341 n. 43 (D. Del. 1976). In considering the various plans submitted, the court found Wilmington-only plans unacceptable, *id.* at 343-44, and rejected the specific inter-district remedies proposed by the parties. The latter included plans relying on voluntary transfer inducement ("magnet" plans), *id.* at 345-46, and several proposals utilizing cluster and pairing techniques, *id.* at 346-48, which the court determined to be "fraught with complex problems unsuitable for judicial determination" and which would "place the Court in the ongoing position of general supervisor of education in New Castle County." *Id.* at 347.

On June 15, 1976, the district court ordered that Delaware schools in the area north of the northern line of the Appoquinimink School District—the area presently comprised of the Alfred I. DuPont, Alexis I. DuPont, Claymont, Conrad, DeLaWarr, Marshalltown-McKean, Mount Pleasant, Newark, New Castle-Gunning Bedford, Stanton, and Wilmington School Districts—be desegregated and reorganized into a new or such other new districts as would comply with the court's May 19, 1976 opinion. The May 19 opinion had set the date for full compliance with constitutional requirements on all grade levels as September 1978. 416 F. Supp. at 361.

Thereafter, appellants took an appeal to the Supreme Court which, on November 29, 1976, dismissed the appeal

on jurisdictional grounds. 45 U. S. L. W. 3399 (U. S. Nov. 29, 1976). The present protective appeals to this court were then pursued.

I.

The Supreme Court's summary affirmance of the district court's 1975 order would appear to be binding on this court under the law of the case principle, which has been explained by the Supreme Court as follows:

> When matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court. Thus a cause proceeds to final determination. While power rests in a federal court that passes an order or decision to change its position on a subsequent review in the same cause, orderly judicial action, except in unusual circumstances, requires it to refuse to permit the relitigation of matters or issues previously determined on a former review.

*Insurance Group Committee v. Denver & Rio Grande Western R. R.*, 329 U. S. 607, 612 (1947) (footnote omitted).

Under the rule of *Hicks v. Miranda*, 422 U. S. 332, 344-45 (1975), lower courts, being bound by summary decisions of the United States Supreme Court, may not reexamine constitutional questions necessarily decided in a summary affirmance. In cases of summary adjudication, of course, it is not always crystal clear what exactly was adjudicated by the Supreme Court, *see Super Tire Engineering Co. v. McCorkle*, – F. 2d – (3d Cir. No. 76-1869, Feb. 25, 1977, Slip Op. at 7), but in this case we conclude that the Supreme Court affirmed the finding of one or more inter-district constitutional violations. The district court found a constitutional violation and ordered the



parties to submit both Wilmington-only and inter-district plans. Thus, in exercising its review function, the Supreme Court perforce considered both the constitutional violation and its inter-district character. Had the Court disapproved of these lower court findings, it would either have found no constitutional violation, thereby precluding the submission of *any* plan, or, alternatively, it would have prohibited the filing of an inter-district plan.

The dissent urges that we should determine which of the eight violations found by the district court were affirmed or not affirmed by the Supreme Court. In view of the doctrine of the law of the case and the very brief order by the Supreme Court, this would become a highly speculative exercise, if indeed, this court has the power to attempt a modification of the Supreme Court's judgment. If the defendants believe that some of the eight alleged violations were not affirmed, they should take, or perhaps previously should have taken, appropriate steps to obtain review of this matter, or a clarification, by the Supreme Court. To order a remand and further proceedings by the district court might well impose an unsolvable problem upon the district court.[2]

The law of the case principle also precludes this court from entertaining appellants' suggestion that the Supreme Court's decision of November 17, 1975, was somehow altered by its June 7, 1976, decision in *Washington v. Davis*, 426 U. S. 229 (1976). The short answer is that it remains for the Supreme Court, not an "inferior" tribunal, to entertain this contention. *Insurance Group Committee v.*

2. The three-judge district court that considered the eight alleged violations has now been dissolved. In its stead a single district judge, the Honorable Murray Schwartz, has been appointed. Thus, under the view expressed by the dissent, Judge Schwartz would undoubtedly have to hear *de novo* all the evidence regarding the alleged violations and then determine, anew, whether there is sufficient evidence to support the findings regarding these alleged violations.

*Denver & Rio Grande Western R. R., supra.* Nor are we persuaded that the *Davis* decision constitutes an "unusual circumstances" exception to the law of the case, in view of the Supreme Court's own explanation that "the holding in *Davis* reaffirmed a principle well established in a variety of contexts. *E.g., Keyes v. School District No. 1,* 413 U. S. 189, 208 (1973) (schools); *Wright v. Rockefeller,* 376 U. S. 52, 56-57 (1964) (election districting); *Akins v. Texas,* 325 U. S. 398, 403-404 (1945) (jury selection)." *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 45 U. S. L. W. 4073, 4077 (U. S., Jan. 11, 1977). We hold, therefore, that one or more inter-district constitutional violations were found by the district court and affirmed by the Supreme Court. Those rulings now constitute the law of the case. Accordingly, we are precluded from re-examining them. Instead, our concentration must be upon the court-ordered remedy.

## II.

### A.

Before considering the specifics of the remedy ordered by the district court, it is important to emphasize that, as a reviewing court, we are not empowered to consider the matter *de novo.* The fashioning of a remedy is committed to "the exercise of the district judge's discretion . . . [and] a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right." *Swann v. Board of Education,* 402 U. S. 1, 15-16 (1971).[3]

3. That the remedy was promulgated by a three-judge court instead of a single judge need not detain us. Even where the convening of a three-judge court was unnecessary, *see, e.g., Board of Regents v. New Left Education Project,* 404 U. S. 541 (1972), the critical jurisprudential effect is that appeal lies to this court. *See Phillips v. United States,* 312 U.S. 246 (1941); *Moody v. Flowers,* 387 U. S. 97, 104 (1967).



The Supreme Court teaches that this exercise of discretion involves certain functional parameters:

> [D]iscretion imports not the court's "inclination, but . . . its judgment; and its judgment is to be guided by sound legal principles." Discretion is vested not for purposes of "limit[ing] appellate review of trial courts, or . . . invit[ing] inconsistency and caprice," but rather to allow the most complete achievement of the objectives . . . attainable under the facts and circumstances of the specific case.

*Franks v. Bowman Transportation Co.,* 424 U. S. 747, 770-71, (1976), *quoting Albemarle Paper Co. v. Moody,* 422 U. S. 405, 421 (1975). And in a recent delineation of the proper appellate role for reviewing exercise of discretion, this court stated that an improper use of discretion exists only when the judicial action is arbitrary, fanciful, or unreasonable, or when improper standards, criteria, or procedures are used. *Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp.,* 540 F. 2d 102, 115-16 (3d Cir. 1976) (in banc).

Thus, our task on review is not to substitute the remedy we would have imposed had we been the district court; rather, it is to determine whether the district court observed promulgated guidelines.

### B.

The sound legal principles that govern the remedy in this case have been enunciated by the Supreme Court.[4] The Supreme Court's school desegregation opinions have consistently emphasized the basic and universal remedial

4. We note that Congress has declared, *inter alia,* as "the policy of the United States," that "all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex or national origin . . ." 20 U. S. C. § 1701(a).

purposes of a desegregation order as well as the intensely practical and unique character of each such order. At the same time the Court has set certain outer limitations upon the exercise of remedial discretion in school desegregation cases.

The guiding purpose of a remedial order in a case such as this is to eliminate unconstitutional racial discrimination "root and branch". *Green v. County School Board,* 391 U. S. 430, 438 (1968). The school system and its students are to be returned, as nearly as possible, to the position they would have been in but for the constitutional violations that have been found.

While the purposes of such a remedy are broad, the details of its structure must necessarily be specific. The plan adopted should be one that promises "realistically to work" in overcoming the effects of discrimination. *Green v. County School Board, supra,* 391 U. S. at 439. "Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. . . . The measure of any desegregation plan is its effectiveness." *Davis v. Board of School Commissioners,* 402 U. S. 33, 37 (1971). The realities and practicalities of each particular case are necessarily matters within the trial court's discretion.

While the unique character of every school system has prevented the Supreme Court from promulgating detailed rules concerning what a court *must do* to remedy a constitutional violation, the Supreme Court has specified what a court *may not* do in such a case. A court is not at liberty to issue orders merely because it believes they will produce a result which the court finds desirable. The existence of a constitutional violation does not authorize a court to seek to bring about conditions that never would



have existed even if there had been no constitutional violation. The remedy for a constitutional violation may not be designed to eliminate arguably undesirable states of affairs caused by purely private conduct (*de facto* segregation) or by state conduct which has in it no element of racial discrimination. This much is settled by *Milliken v. Bradley, supra. See also Spencer v. Kugler,* 404 U. S. 1027 (1972), affirming 326 F. Supp. 1235 (D. N. J.); *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* — U. S. —, 45 U. S. L. W. 4073, 4077 and n. 15, 4078-79 and n. 21. Nor may a remedial desegregation order require "as a matter of substantive constitutional right, any particular degree of racial balance or mixing . . . . The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." *Swann v. Board of Education, supra,* 402 U. S. at 24. If that language were not clear enough, the Supreme Court has more recently repeated that "[t]he clear import of this language from *Swann* is that desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in each 'school, grade or classroom.' *Milliken v. Bradley,* 418 U. S. at 740-41 (footnote omitted). These are limitations by which a trial court must abide.

The task of a remedial decree in a school desegregation case is simply to correct the constitutional violation and to eradicate its effects. "As with any equity case, the nature of the violation determines the scope of the remedy." *Swann v. Board of Education, supra,* 402 U. S. at 16.

III.

Formulating a realistic, practical, and effective remedy is a job peculiarly within the province of the trial court,

whose position gives it a quantum advantage over an appellate court in weighing the "practicalities of the situation". It is primarily for this reason that we defer to the trial court's exercise of remedial discretion when it has applied proper legal precepts and remained within determined legal boundaries. *See Lindy Bros., supra,* 540 F. 2d at 116. Perhaps not all of the judges on this court would have promulgated the remedy prescribed by the district court. But given the nature of the judicial system —in Roscoe Pound's formulation, "a body of traditional ideas as to how legal precepts should be interpreted and applied and causes decided, and a traditional technique of developing and applying legal precepts"[5]—this court is required to follow a narrow compass.[6] Viewed in this context, we cannot say that the result ordered by the district court was a misuse of discretion.

Although we find no misuse of discretion in the basic concept of the remedy, we are disturbed by language in the district court's opinion which can be interpreted as requiring an enrollment of 10-35% black students in each grade. 416 F. Supp. at 356-57. The district court explained this language as follows: "We do not propose the imposition of definitive racial quotas for particular schools. What we set forth here is not a determination of a 'quota'. Rather, it is a statement of what will be considered a desegregated school upon any necessary review of actual assignments made by local officials." *Id.* at 356. Although we accept the district court's explanation that no definitive racial quota was intended, we also believe that this aspect of its opinion might be misunderstood. The Supreme Court has clearly stated that "desegregation, in the sense of dismantling a dual school system, does not require any particular racial balance in each 'school, grade, or classroom.'" *Milliken v. Bradley, supra,* 418 U. S. at 741. We are not free to ignore that statement. Accordingly, and to avoid any possible misunderstanding, we expressly disapprove the 10-35% enrollment criterion, and we specifically hold that no particular racial balance will be required in any school, grade, or classroom.

5. Pound, *The Theory of Judicial Decision,* 36 HARV. L. REV. 641, 645 (1923).

6. We note also that a reviewing court may approve the judgment of a reviewed court without embracing its *ratio decidendi:* "[W]e may affirm a judgment of the district court if the result is correct even though our reasoning be inconsistent with that of the trial court." *Rhoads v. Ford Motor Co.,* 514 F. 2d 931, 934 (3d Cir. 1975).



For the reasons set forth in Part II, *supra.* We affirm the basic concept of the remedy ordered by the district court. Those portions of the district court opinion capable of a meaning at variance with the principles stated in Part II, *supra,* are not embraced by this court; those portions of the district court's opinion capable of being construed as inconsistent with Part II, *supra,* will be modified so as to remove the possibility of inconsistency or ambiguity.

## IV.

In ordering reorganization or consolidation of the New Castle County school districts, the district court stressed that "the State Legislature and the State Board of Education may take such steps as are not violative of constitutional rights to change the pattern set here," 416 F. Supp. at 357, and ordered creation of an interim board to operate the schools "for so long as the State takes no action." *Id.* We specifically affirm this governance plan and emphasize that prompt compliance by the state may make action by the interim board unnecessary. Moreover, we do not mandate any specific number of districts which the state may create within the area presently encompassed by the defendant districts nor do we require that

all the existing districts be reconstituted. We do caution that a "Wilmington only" plan will not be adequate. We add one additional provision. We shall require State authorities to file with the district court within 60 days from the date hereof a formal report of its efforts to carry out the mandate of the district court.

V.

To eliminate the necessity for additional proceedings in the district court, we now set forth the specific order to be entered upon the return of the mandate of this court:

JUDGMENT

For the reasons set forth in the opinion of the Court of Appeals for the Third Circuit, filed May 18, 1977 and Parts VI, VI A, VI C, VII, VII A, VII B, VII C, VII D, VIII, IX, IX B, and IX C of the Opinion of this Court issued May 19, 1976,

IT IS HEREBY ORDERED AND DECREED:

1. (a) That this action shall be maintained as a class action, and the class shall consist of all black and Hispanic children presently enrolled in the Wilmington, Delaware School system, and that the representation of the Intervening Plaintiffs Pacheco, Rodriguez, et al., is limited to the protection of the interests of the Hispanic students who are members of the class, in receiving bilingual education;

(b) That the class so defined shall be represented by the named plaintiffs before the Court who are members of the class, through their parents, legal guardians, or next friends;

2. That the schools in that area of Delaware north of the northern line of the Appoquinimink



School District; that is, the area presently comprised of the Alfred I. DuPont, Alexis I. DuPont, Claymont, Conrad, DeLaWarr, Marshallton-McKean, Mount Pleasant, Newark, New Castle-Gunning Bedford, Stanton, and Wilmington School Districts, shall be desegegated in accordance with the Opinion of the Court of Appeals for the Third Circuit, and shall be reorganized into a new or such other new districts as shall be prescribed by the state legislature or the State Board of Education, so long as such prescription shall comply with that opinion, thereby eliminating the dual school system (379 F. Supp. 1218, 1223) and the vestige effects of de jure segregation;

3. The State Board of Education or other appropriate State authority shall file a formal report in accordance with Part IV of the Opinion of the Court of Appeals of the Third Circuit within 60 days from May 18, 1977 (date of filing this opinion);

4. The State Board of Education shall, if the state legislature or the State Board of Education do not promptly comply with paragraph 2 of this Order:

(a) Appoint a board of five members (the "New Board") to oversee the operation of the schools of the area as defined in ¶ 2 of this Order, such members to be appointed so that one member of the New Board shall be a member of the present Newark School Board; one member of the New Board shall be a member of the present Wilmington School Board; one member of the New Board shall be a member of either the present New Castle-Gunning Bedford, or DeLaWarr or Conrad School Boards; one member of the New Board shall be a member of the present Stanton, Marshallton-McKean, or Alexis I. Du-

Pont School Boards; and one member of the New Board shall be a member of either the present Alfred I. DuPont, Mount Pleasant or Claymont School Boards; and that the members of the New Board so appointed shall serve until their successors are selected and duly qualified;

b. Cooperate and assist the New Board in all planning and operational phases of the implementation of a plan which shall be designed to desegregate the schools in accordance with the Opinion of the Court of Appeals;

(c) Exercise appropriate supervision of the New Board or its successors and its exercise of authority;

(d) Set a date certain for the transfer of full responsibility for the operation of the schools to the New Board or such successor or successors designated by state law; such date to be prior to September 1, 1977;

(e) Be responsible, together with the presently existing boards, for any expenses created by the operation of the New Board or its successor or successors until such time as the New Board or its successor or successors, in a transfer of authority, receive taxing power, in accordance with ¶ 4(d) hereof, and state law;

5. The New Board or its successor or successors shall:

(a) Commence immediately upon appointment to consider any necessary planning for the transfer to it of operating authority;



(b) Prepare a plan for the operation of unitary desegregated schools, in accordance with the Opinion of the Court of Appeals;

(c) Accept responsibility for the operation of the schools, beginning with the Fall, 1977 term, in accordance with a timetable to be set by the State Board of Education;

6. The existing boards of the present school districts shall assist in the transfer of authority, and shall be liable together with the State Board for the expenses of the New Board or its successor or successors, until such time as the New Board or its successors receive taxing authority, in accordance with ¶ 4(d) hereof, and state law; the aforesaid expenses of the New Board shall be borne by the existing boards of the present school districts and by the State Board; each existing board's contribution being assessed in proportion to the ratio which the assessed value of taxable property in that present school district bears to the total assessed value of taxable property in all districts; provided, however, that each existing board's contribution shall be reduced from the aforesaid sum by virtue of the State Board's required contribution, which contribution shall equal the largest contribution required from any of the local boards;

7. The State Board in cooperation with the existing local districts, may assign members of the professional staff of the Department of Public Instruction or the local districts, to assist the New Board during the period prior to September, 1977;

8. Upon the transfer of full authority to the New Board or its successors, the present boards shall, in accordance with state law, cease to exist;

9. The provisions of Paragraphs 1 through 8 of this Order in accordance with VII D of the Opinion of this Court of May 19, 1976, shall be inapplicable to the New Castle County Vocational-Technical School District;

10. The application of the plaintiff class for an injunction to restrain the payment by the State of any subsidy for the transportation of students to private schools is denied;

11. The provisions of Paragraphs 2 and 8 of this Order shall be stayed in accordance with VI C of the Opinion of this Court of May 19, 1976; and

12. The three-judge panel convened for the purpose of considering the above matters is dissolved, and supervisory jurisdiction will remain in the District Court, in accordance with provision IX C of the Opinion of May 19, 1976 and the mandate of the Court of Appeals for the Third Circuit in *Evans v. Ennis*, 281 F. 2d 385, 391 n. 1 (1960).

As so modified, the judgment of the district court will be affirmed. The mandate of the court will issue forthwith.

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GARTH, *Circuit Judge,* with whom Judges Rosenn and Hunter join, dissenting:

I regret that I cannot join the majority in this case. The modified order which the majority has affirmed commands Delaware officials [1] to "desegregate" the schools

1. Throughout this opinion I have used the term "Delaware officials" to refer to the various state and local bodies and officials which, under the modified order, are given the responsibility of



of northern New Castle County [2] "in accordance with the Opinion of the Court of Appeals for the Third Circuit. . . ." But neither the modified order nor the majority opinion reveals what "desegregation" requires in this case. Neither addresses the following two critical issues: 1. what are the interdistrict violations, if any, with which we are concerned and 2. what effects, if any, do those violations now have on the racial composition of the schools of northern New Castle County? I do not believe that it makes sense for the federal courts to order Delaware officials to "desegregate" the schools of northern New Castle County until the courts have resolved these two issues. As a result, I must respectfully dissent from the decision reached by the majority.

I believe that this Court should specify which of the eight interdistrict violations are to be remedied. After we have made that determination, we should remand this case to the district court so that the continuing effects of

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1. (Cont'd.)
implementing a plan of desegregation. These officials and bodies include the state legislature, the State Board of Education, and the new school board which may be created under paragraph 4(a) of the modified order.

Under the modified order, the responsibility for desegregating the affected schools rests in the first instance with the state legislature and the State Board of Education. Modified Order at para. 2.

If the state legislature and the State Board of Education do not effectuate desegregation "promptly", the responsibility shifts to the new five-member board of education described in paragraph 4 (a) of the modified order. Four of the five members of this new board are to be members of the current boards of education of *defendant* school districts. One is to be a member of the current board of education of the Wilmington School District, which is a plaintiff in this action.

2. I have used the term "northern New Castle County" to refer to the eleven school districts listed in paragraph 2 of the modified order.

any such interdistrict violations can be assessed.[2a] While I sympathize fully with the majority's obvious desire to bring this already protracted litigation to a close, I do not believe that there is any shortcut around the procedure which I have outlined. Indeed, I am afraid that the path taken by the majority will have the effect of prolonging this litigation rather than of shortening it.

## I.

I must confess that if I were a Delaware official charged with desegregating the schools of northern New Castle Coutnty "in accordance with the Opinion of the Court of Appeals for the Third Circuit," I would not know where to begin.

The majority opinion correctly observes that the remedy in this case must return the "school system and its students . . . , as nearly as possible, to the position they would have been in *but for the constitutional violations*

2a. The majority suggests that if this Court were to remand this case to the district court for further findings, an "unsolvable problem" would result. Maj. Op. at 7 n. 1a. It notes that the three-judge district court to which this case was previously assigned has been dissolved and that the case has been reassigned to a single district court judge who did not sit on the three-judge court. *Id.* The majority therefore concludes that the new district court judge "would undoubtedly have to hear *de novo* all the evidence concerning the alleged violations." *Id.* I can not agree. On remand, the single district court judge, in the sound exercise of his discretion, could make the required findings on the present record or he could supplement that record by taking additional evidence, an action which under my view of the case would be required regardless of the identity of the fact finder. He clearly would not be compelled to rehear evidence already in the record. *Cf.* Group Assoc. Plans, Inc. v. Colquhoun, 466 F. 2d 469, 472 (D. C. Cir. 1972) (similar directions given where case remanded to district court for additional findings of fact after original district court judge had died); Fed. R. Civ. Proc. 63; 7 J. Moore, Federal Practice ¶ 63.04 (2d Ed. 1975); 11 C. Wright & A. Miller, Federal Practice & Procedure § 2922 (1973). In any event, the administrative decision made by the District Court for the District of Delaware to assign this case to a new district court judge cannot be permitted to influence the disposition of this appeal.



*that have been found.*" (Emphasis added.) Maj. Op. at 10. *See also Austin Independent School District v. United States,* 45 U. S. L. W. 3413 (December 7, 1976) (Powell, J., concuring); *Pasadena City Board of Education v. Spangler,* 427 U. S. 424, 434 (1976); *Hills v. Gautreux,* 425 U. S. 284, 293-94 (1976); *Milliken v. Bradley,* 418 U. S. 717, 744-45, 746 (1974); *Swann v. Board of Education,* 402 U. S. 1, 16 (1971). However, the majority opinion does not identify those interdistrict violations which have been found in this case and which require a remedy. It interprets the Supreme Court's summary affirmance, *Buchanan v. Evans,* 423 U. S. 963 (1975), to mean that "one or more inter-district constitutional violations" [2b] occurred.

Maj. Op. at 7. But the district court identified *eight* separate interdistrict violations, *viz.*, 1. the enactment of Educational Advancement Act of 1968 [EAA],[3] 2. the location of public housing projects,[4] 3. state subsidies for the interdistrict transportation of students attending private schools,[5] 4. the establishment by the Wilmington school board of optional attendance zones,[6] 5. the recordation of deeds containing racially restrictive covenants,[7] 6. portions of the Federal Housing Administration's mortgage underwriting manual,[8] 7. portions of

2b. The majority's failure even to indicate how many violations must be remedied illustrates the impossible nature of the task facing the Delaware officials who must develop a plan to remedy the continuing effects of those violations, without ever knowing the identity of the particular violations affirmed.

3. Evans v. Buchanan, 393 F. Supp. 428, 438-46 (D. Del. 1975).

4. *Id.* at 435.

5. *Id.* at 436-37.

6. *Id.* at 435-36.

7. *Id.* at 434.

8. *Id.*

the Delaware Real Estate Commission handbook,[9] and 8. the interdistrict transportation of students attending all-black or all-white schools prior to *Brown v. Board of Education*, 347 U. S. 483 (1954).[10]

The majority does not reveal which of these violations it believes the Supreme Court affirmed. Nor does it explain what has become of the remaining violations. If those violations were not affirmed by the Supreme Court, then obviously they are before this Court in this appeal. The majority, however, has failed to address this question. I do not understand how the Delaware officials can possibly devise a plan to remedy the continuing effects of past interdistrict violations when the majority has failed to disclose the identity of the violations which the Supreme Court affirmed.[10a]

Even if it is assumed *arguendo* that *all* eight interdistrict violations have been properly established, the Delaware officials would still be unable to determine what "desegregation" means in the context of this case until the courts determine what the continuing effects of those violations are. As I have noted, the proper remedial goal is to return the "school system and its students . . . , as nearly as possible, to the position they would have been in but for the constitutional violations that have been found."

9. *Id.* at 434-35.

10. *Id.* at 433-34.

10a. The majority states that "[i]f the defendants believe that some of the eight alleged violations were not affirmed [by the Supreme Court] they should take, or perhaps previously should have taken, appropriate steps to obtain review of this matter, or a clarification, by the Supreme Court." Maj. Op. at 7. The majority opinion does not reveal, however, those additional steps it believes that the defendants should have taken in order to obtain clarification from the Supreme Court. The defendants did file a petition for rehearing, but the Supreme Court denied their petition. 423 U. S. 1080 (1976). We recognize, as the defendants undoubtedly do, that Sup. Ct. Rule 58(4) provides: "Consecutive petitions for rehearings . . . will not be received."



Maj. Op. at 10. In this case, however, the district court never attempted to ascertain what the racial composition of the schools of northern New Castle County would be but for the constitutional violations which it identified. Instead, the district court appears to have proceeded upon the assumption that the proper remedial goal was to achieve a particular degree of racial balance thought to be socially or educationally desirable,[11] *viz.*, 10% to 35% black students and 65% to 90% white students. The majority opinion rejects the district court's statistical guidelines,[12] but it fails to remand the case to the district court so that the continuing effects of any valid interdistrict violations can be ascertained. I do not see how the Delaware officials can devise a plan to remedy the continuing effects of past interdistrict violations until the extent of those effects is determined by the court. After all, it is by no means obvious what the racial composition of the affected schools would be at present if the eight violations found by the district court had not occurred. One could argue in good faith that but for those violations the ratio of black students to white students would be approximately the same in all the affected schools. One could also argue in good faith that even if those eight violations had never occurred, the racial composition of the affected schools would not be appreciably different from what it is today. I do not see how a proper remedial plan can be developed until the court assesses the continuing effects of any valid interdistrict violations. Until such an assessment is made, it will be impossible to determine whether or not the required causal connection exists between the violations and the remedies which the parties may propose.

11. Evans v. Buchanan, 416 F. Supp. 328, 355-57 (D. Del. 1976). *See* in particular the text accompanying notes 138, 146, and 147.

12. Maj. Op. at 10.

In short, the majority opinion is disturbingly similar to an opinion in a tort case in which the defendant is told by the court: "You have committed a tort against the plaintiff, but we will not tell you what that tort was. Nor will we tell you what the plaintiff's damages are. *You* decide what tort you think you committed, and *you* determine what the plaintiff's damages are. If you cannot—or if your damages do not satisfy the plaintiff—then we will step in." It seems to me that this is a curious procedure indeed.

The majority's failure to address the two critical questions which I have noted is almost certain to result in prolonging this litigation still further, for the plain fact is that the modified order and the majority opinion do not effectively require the alteration of the present school district lines or the reassignment of any students. The modified order and the majority opinion do not require any particular racial balance in the affected schools. Maj. Op. at 11. Nor do they require the creation of any particular number of districts. Modified Order at para. 2. Since the majority opinion states that the Supreme Court affirmed the existence of "one or more" interdistrict violations, the defendants could quite reasonably interpret the modified order and the majority opinion to mean that only one violation was affirmed by the Supreme Court and that only that violation need be remedied. The defendants could argue—as I have (*see* part II A *infra*)—that the violation affirmed by the Supreme Court was the enactment of the Educational Advancement Act. Since portions of the EAA were held to be discriminatory because they precluded the State Board of Education from *considering* the desirability of consolidating all or part of Wilmington with nearby districts,[13] the defendants could quite reasonably take the

13. Evans v. Buchanan, 393 F. Supp. 428, 442 (D. Del. 1975).



position that the continuing effects of this violation can be remedied simply by requiring the State Board to *consider* whether it would be educationally desirable to consolidate Wilmington with nearby districts and by empowering the State Board to effect such consolidations if it determines that they are beneficial. If the defendants take this position then the plaintiffs will undoubtedly challenge their actions in the district court, and that challenge will soon find its way back to this Court. We will then be forced to deal with the two issues which the majority has refused to address today. In the interim, still more time will have been lost.

## II.

I therefore believe that this Court is required at this time to consider the validity of the eight interdistrict violations found by the district court. I have briefly sketched out below the manner in which I would dispose of this issue.

### A.

In considering the validity of the eight interdistrict violations found by the district court, the first question which must be faced is the effect of the Supreme Court's summary affirmance. I am convinced that only one interdistrict violation was affirmed by the Supreme Court. In my view, that violation was the enactment of the EAA.

The Supreme Court's summary affirmance grew out of the following sequence of events. On March 27, 1975, after the completion of hearings on the question of whether any interdistrict violations had occurred,[14] the three-judge district court issued an opinion in which it identified eight such violations. *Evans v. Buchanan*, 393 F. Supp. 428

14. *See* Evans v. Buchanan, 393 F. Supp. 428, 430-31 (D. Del. 1975).

(D. Del. 1975). On April 16, 1975, the court entered an order based upon the findings contained in that opinion. The order 1. required the parties to submit both interdistrict desegregation plans and plans which affected only the Wilmington schools and 2. enjoined the State Board of Education, in preparing its interdistrict plans, from relying upon the provisions of the EAA which the district court had found to be unconstitutional. The defendants took an appeal from this order to the Supreme Court under 28 U. S. C. § 1253 (1970), which gives the Supreme Court jurisdiction to hear an appeal "from an order granting or denying . . . an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." The Supreme Court summarily affirmed without issuing an opinion. *Buchanan v. Evans, supra.*[15]

In determining the effect of the Supreme Court's summary affirmance, we obviously cannot assume that the Supreme Court approved the reasoning in the district court's opinion. *Fusari v. Steinberg*, 419 U. S. 379, 391 (1975) (Burger, C.J., concurring). Rather, we must attempt to determine those conclusions which the Supreme Court *must* have reached in order to have disposed of

15. Thereafter, the district court conducted evidentiary hearings on the remedial plans submitted by the parties. The district court issued an opinion which discussed the remedial aspect of this case. Evans v. Buchanan, 416 F. Supp. 328 (D. Del. 1976). It then entered the order from which the present appeal was taken. In addition to taking an appeal to this Court under 28 U. S. C. § 1291 (1970), the defendants also sought once again to appeal directly to the Supreme Court under 28 U. S. C. § 1253 (1970). However, the Supreme Court dismissed their appeals for want of jurisdiction [Del. State Bd. of Educ. v. Evans, 45 U. S. L. W. 3394 (November 30, 1976)], apparently because a three-judge court had not been required after the injunction against the enforcement of the EAA had been issued. *See* Memorandum for the United States as Amicus Curiae at 6-7, Del. State Bd. of Educ. v. Evans, *supra*.



the appeal as it did. In making this determination, it will be helpful to consider separately each of the two parts of the district court's order.

*The portion of the order of April 16, 1975, which forbade reliance upon certain provisions of the EAA.*

The defendants suggest that the Supreme Court need not have concluded that certain provisions of the EAA were unconstitutional in order to have affirmed the portion of the order of April 16, 1975, which forbade reliance upon those provisions. The defendants argue that this portion of the district court's order constituted a preliminary injunction. They then observe that a district court can issue a preliminary injunction against the enforcement of a statute challenged as unconstitutional without concluding that the statute is invalid. The district court, they note, need only determine that "serious questions" concerning the Act's constitutionality have been raised and that the other prerequisites for preliminary injunctive relief have been satisfied. *Mayo v. Canning Co.*, 309 U. S. 310, 316 (1940). *See also Brown v. Chote*, 411 U. S. 452, 456 (1973). If the district court grants the preliminary injunction and an appeal is taken, the appellate court's review, they argue, is limited to determining whether the district court abused its discretion in reaching the conclusions which it did. *Doran v. Salem Inn, Inc.*, 422 U. S. 922, 931-32 (1975); *Brown v. Chote, supra*, at 457; *Oburn v. Shapp*, 521 F. 2d 142, 147 (3d Cir. 1975). In sum, the defendants suggest that when the Supreme Court affirmed the portion of the district court order forbidding reliance upon portions of the EAA, the Court determined only that the district court had not abused its discretion in determining that the plaintiffs' showing raised "serious questions" concerning the constitutionality of those provisions.

R. Wolfson & P. Kurland, Robertson and Kirkham Jurisdiction of the Supreme Court of the United States § 196 (1951).

If the defendants were correct in characterizing the portion of the order with which we are now concerned as a preliminary injunction, then the result which they urge would follow. I am persuaded, however, that that portion of the order must be viewed as a permanent, rather than a preliminary, injunction even though it formed part of a non-final, "interlocutory" order.[16]

A preliminary injunction is an injunction "issued to protect plaintiff from irreparable injury and to preserve the court's power to render a meaningful decision after a trial on the merits." 11 C. Wright and A Miller, Federal Practice and Procedure § 2947 at 423 (1973). The granting or denial of an application for a preliminary injunction "does not involve a final determination on the merits." *Benson Hotel Corp. v. Woods*, 168 F. 2d 694, 696 (8th Cir. 1948). As Judge Jerome Frank once wrote:

16. It is not unusual for a permanent injunction to be contained in a non-final, "interlocutory" order. *See, e.g.*, Hook v. Hook & Ackerman, Inc., 213 F. 2d 122 (3d Cir. 1954); Fidelity Trust Co. v. Bd. of Educ., 174 F. 2d 642 (7th Cir. 1949); 7 J. Moore, Federal Practice ¶ 65.21 at 152 n. 16 (2d ed. 1975). This point may be obscured by the fact that the term "interlocutory" has at least two quite distinct meanings. Orders which are not "final" under 28 U. S. C. § 1291 (1970) are often referred to as "interlocutory." *See, e.g.*, 28 U. S. C. § 1292 (1970); 9 J. Moore, Federal Practice ¶ 110.08 [1] at 111 (2d ed. 1975). In addition, prior to the enactment of the Federal Rules of Civil Procedure (and in some jurisdictions today), the term "interlocutory injunction" was used to refer to the type of injunction labelled "preliminary" in the Federal Rules. Hamilton Watch Co. v. Benrus Watch Co., 206 F. 2d 738, 742 (2d Cir. 1953); Note, Developments in the Law—Injunctions, 78 Harv. L. Rev. 994, 1055 & n. 3 (1965). For surviving examples of this usage, *see* 28 U. S. C. § 1253 (1970); Supreme Court Rule 15 (g). Since these two meanings of the term "interlocutory" are quite distinct, there is no reason why an injunction contained in an "interlocutory" (i.e. non-final) order need be an "interlocutory" (i.e., preliminary) injunction.



> [A] preliminary injunction—as indicated by the numerous more or less synonymous adjectives used to label it—is, by its very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized, by its for-the-time-beingness. It serves as an equitable policing measure to prevent the parties from harming one another during the litigation; to keep the parties, while the suit goes on, as far as possible in the respective positions they occupied when the suit began.

*Hamilton Watch Co. v. Benrus Watch Co.*, 206 F. 2d 738, 742 (2d Cir. 1953). Preliminary injunctions are typically issued after an abbreviated hearing. 7 J. Moore, Federal Practice ¶ 65.04 [3] (2d ed. 1975); 11 C. Wright & A. Miller § 2949 (1973); Developments in the Law—Injunctions, 78 Harv. L. Rev. 994, 1055 (1965). And in appropriate circumstances, they may be granted based solely upon the parties' affidavits. *Wounded Knee Legal Defense/Offense Committee v. FBI*, 507 F. 2d 1281, 1286-87 (8th Cir. 1974); *K-2 Ski Co. v. Head Ski Co.*, 467 F. 2d 1087, 1088 (9th Cir. 1972); *Industrial Electronics Corp. v. Cline*, 330 F. 2d 480, 483 (3d Cir. 1964).

By contrast, "[a] permanent injunction is ordinarily issued only 'after a full trial on the merits.'" *Chappell & Co. v. Frankel*, 367 F. 2d 197, 203 (2d Cir. 1966). The granting or denial of a request for a permanent injunction obviously constitutes an adjudication on the merits.

In this case, when the district court determined that certain provisions of the EAA were unconstitutional and embodied that decision in the order of April 16, 1975, there was nothing "tentative, provisional, ad interim, impermanent, [or] mutable" about that decision. At the pretrial conference, the district court had decided to

bifurcate the proceedings. *Evans v. Buchanan,* 379 F. Supp. 1218, 1220 n. 1. (D. Del. 1974). The first stage was to concern whether any constitutional violations had occurred. If such violations were found, the second stage was to concern the appropriate remedy. *Id.* When the district court entered the order of April 16, 1975, it had completed the first stage of the bifurcated proceeding. A full trial had been held on the question of whether any interdistrict violations had occurred, and the court had satisfied itself that certain provisions of the EAA *were* unconstitutional, not that the plaintiffs had raised "serious questions" concerning their constitutionality. As a result, it seems to me that the portion of the order of April 16, 1975, which forbade reliance upon certain parts of the EAA must be regarded as a permanent rather than a preliminary injunction. Consequently, when that portion of the order came before the Supreme Court on appeal, it must have been tested against the standard of review applicable to a permanent injunction enjoining enforcement of a statute held unconstitutional. That standard of review is whether the lower court committed legal error in determining that the statute was unconstitutional. *See, e.g., Whalen v. Roe,* 45 U. S. L. W. 4166 (February 22, 1977). Since the Supreme Court affirmed the portion of the order of April 16, 1975, which prohibited reliance upon certain provisions of the EAA, the Court must necessarily have concluded that the district court did not err in holding the EAA unconstitutional in part. And since the provisions of the EAA struck down by the district court obviously affected more than one school district, the Supreme Court's summary affirmance necessarily meant that the enactment of the EAA constituted an interdistrict violation.

The defendants also argued strenuously that even if the Supreme Court's summary affirmance established the unconstitutionality of portions of the EAA, that determination was overruled by the Supreme Court's subsequent decisions in *Washington v. Davis,* 426 U. S. 229 (1976), and *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 45 U. S. L. W. 4073 (January 11, 1977). Based upon a comparison of the district court's opinion of May 27, 1975, and the Supreme Court's opinions in *Washington v. Davis* and *Village of Arlington Heights,* it seems clear that the defendants' argument merits serious consideration.[17] Nevertheless, I agree with the majority that it is the province of the Supreme Court and not of the Court of Appeals to reconsider the Supreme Court's ruling in this case in light of subsequent Supreme Court decisions.



*The portion of the order of April 16, 1975, which required the preparation of inter- and intradistrict plans.*

It is not completely clear whether the Supreme Court's summary affirmance even reached the portion of the district court's order which required the submission of inter- and intra district plans.[18] Fortunately, the answer to that question has no effect on the outcome of this appeal.

17. *Compare* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., *supra,* at 4077, *with* Evans v. Buchanan, 393 F. Supp. 428, 439 (D. Del. 1975). *See also* Bd. of School Comm'rs v. Buckley, 45 U. S. L. W. 3508 (January 25, 1977), *vacating,* United States v. Bd. of School Comm'rs., 541 F. 2d 1211 (7th Cir. 1976); Austin Ind. School Dist. v. United States, 45 U. S. L. W. 3413 (December 7, 1976), *vacating,* 532 F. 2d 380 (5th Cir. 1976).

It could argued that *Washington v. Davis* and *Village of Arlington Heights* do not affect the Supreme Court's ruling on the EAA. *See* United States v. Bd. of School Commissioners, 541 F. 2d 1211, 1227 (7th Cir. 1976) (Tone, J., dissenting).

18. As the three Supreme Court justices who dissented in Buchanan v. Evans, *supra,* pointed out, it is not completely clear whether the Supreme Court's jurisdiction under 28 U.S.C. § 1253 (1966) is limited to those portions of a three-judge court order

If the only portion of the district court order which was before the Supreme Court was the part which prohibited reliance upon the EAA, then obviously the only interdistrict violation which the Court affirmed was the enactment of the EAA. If, on the other hand, both segments of the order of April 16, 1975, were before the Supreme Court, the same conclusion follows. Once the Supreme Court determined that the enactment of the EAA constituted an interdistrict violation, it followed *a fortiori* that the district court had not erred in ordering the submission of inter-, as well as intradistrict plans. As a result, the Court had no occasion to inquire into the validity of any of the other seven interdistrict violations found by the district court.

B.

Since, under my analysis, the Supreme Court's summary affirmance reached only one of the eight interdistrict

18. (Cont'd.)
which grant or deny an injunction or whether the Court's jurisdiction embraces the entire district court order so long as one portion of it grants or denies an injunction. 423 U. S. at 974-75. If the Supreme Court's jurisdiction under 28 U. S. C. § 1253 (1970) is limited to those portions of the order which grant or deny injunctions, then it is unclear whether the Supreme Court reviewed the portion of the order of April 16, 1975, which required the submission of inter- and intradistrict plans, since it is uncertain whether an order requiring the preparation and submission of desegregation plans constitutes an order granting an "injunction." The Second and Sixth Circuits have held that orders of this type are not orders granting "injunctions" and that therefore they are not appealable under 28 U. S. C. § 1292(a)(1) (1966). Hart v. Community School Board, 497 F. 2d 1027, 1030 & n. 4 (2d Cir. 1974) (Friendly, J.); Bradley v. Milliken, 468 F. 2d 902 (6th Cir. 1972), *cert. denied*, 409 U. S. 844 (1972) (earlier stage of Milliken v. Bradley, 418 U. S. 717 (1974), litigation); Taylor v. Bd. of Educ., 288 F. 2d 600, 604-06 (2d Cir. 1961) (Friendly, J.). The Fifth and Tenth Circuits have reached the opposite result. Bd. of Educ. v. Dowell, 375 F. 2d 158 (10th Cir. 1967); Bd. of Public Instruction v. Braxton, 326 F. 2d 616 (5th Cir. 1964). *See also* 9 J. Moore, Federal Practice ¶ 110.20 [1] at 234-35 (2d ed. 1975).



violations found by the district court, the validity of the other seven violations is before this Court in this appeal. At this time, I would not affirm the district court's findings concerning these seven violations. Instead, I would remand this case to the district court so that it could determine whether each of those violations is supported by the "racially discriminatory intent or purpose" [19] required by *Washington v. Davis* and *Village of Arlington Heights*.

The district court opinion in which the interdistrict violations were set out was issued more than one year before *Washington v. Davis* was decided. As a result, the district court did not make findings of fact concerning the intent or purpose behind each of the eight violations of the Equal Protection Clause which it identified.

With respect to three of the seven violations now before this Court—the FHA mortgage underwriting manual, the Delaware Real Estate Commission handbook, and the pre-*Brown* interdistrict busing—the existence of a racially discriminatory intent appears so obvious that the district court's failure to make specific findings concerning intent might not have required a remand [20] if one were not required for other reasons. On the other hand, the district court's failure to make findings concerning the intent which motivated the other four violations—the location of public housing projects, the recordation of deeds with racially restrictive covenants, the state subsidies for the interdistrict transportation of private school students, and the establishment by the Wilmington School Board of optional attendance zones—does necessitate a remand. Not only did the district court fail to find that these actions were motivated by a racially discriminatory intent, but there is

19. Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 45 U. S. L. W. 4073, 4077 (January 11, 1977).

20. Richerson v. Jones, No. 76-1762 et al. (3d Cir., filed March 7, 1977) at 9; Estate of Hooper v. Govt. of Virgin Islands, 427 F. 2d 45, 48 (3d Cir. 1970).

language in the court's opinion which may imply that the court felt that the opposite was true.[21] Moreover, a plausible nondiscriminatory purpose for each of these actions is readily apparent. Consequently, it seems essential that this case be remanded to the district court so that it can make findings concerning the intent or purpose behind these four actions. Since a remand is necessary for this purpose—as well as for the reason explained in part III—the district court should be instructed to make findings concerning the other three violations as well.

## III.

In my view, a remand to the district court is also required so that the district court can determine as precisely as possible what the racial composition of the schools of northern New Castle County would now be if those interdistrict violations found to be valid had not taken place. To put it another way, the district court should determine to what extent the present racial makeup of the affected schools is attributable to acts which violated the Equal Protection Clause and to what extent it is attributable to economic and social forces, to private actions, and to nondiscriminatory governmental actions. After the district court has made that determination, it could then require the parties to submit plans designed to remedy the effects of the constitutional violations.

I recognize that it may not be easy for the district court to determine what the racial composition of the affected schools would now be if no violations had occurred. Nevertheless, the Constitution requires that just such a determination be made, and I am confident that the district court could make a reasonably accurate assessment.

21. *See, e.g.*, 393 F. Supp. at 435.



In any event, such a determination will have to be made eventually. It seems to me that it is in everyone's interest to have it done as soon as possible.

For the reasons expressed above, I respectfully dissent.

# APPENDIX B.

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IN THE UNITED STATES DISTRICT COURT,
For the District of Delaware.

BRENDA EVANS, et al.,
*Plaintiffs,*
*vs.*
MADELINE BUCHANAN, et al.,
*Defendants.*

Civil Action
Nos. 1816-1822.

Before GIBBONS, *Circuit Judge*, WRIGHT, *Senior District Judge*, and LAYTON, *Senior District Judge*.

## OPINION.

Wilmington, Delaware
May 19, 1976

WRIGHT, *Senior District Judge*.

This case arises under the continuing jurisdiction of this Court to implement prior opinions finding unconstitutional segregation in the public schools in Delaware.[1] The instant opinion concerns the choice of an appropriate remedy for constitutional violations in the operation of the schools of Wilmington and the surrounding suburban districts and the requirement of an inter-district remedy. In prior opinions, this Court ruled that the segregation of the Wilmington schools was never erased;[2] and that this segregation resulted from a combination of factors, including demographic and housing

1. *See,* Evans v. Buchanan, 379 F. Supp. 1218, 1220-21 (D. Del. 1974), for a recitation of the previous course of this litigation.
2. 379 F. Supp. at 1223.

patterns initiated and supported by state action; and the redrawing of school district lines during a period of consolidation and reorganization under the Educational Advancement Act. 14 Del. C. §§ 1001, *et seq.*[3] Having found a violation which included inter-district effects, we ruled that under the guidelines laid down in *Milliken* v. *Bradley*, 418 U. S. 717 (1974), [hereinafter *"Milliken"*] the Court could consider both inter- and intra-district remedies for the constitutional deprivation. 393 F. Supp. at 446-47, *aff'd. per curiam*, ..... U. S. ..... (No. 74-1418), 44 U. S. L. W. 3299 (November 17, 1975).

Following the ruling of this Court on the liability phase, the parties[4] were directed to develop plans to remedy the violations found, using both inter- and intra-district methods. These plans were to be submitted through the State Board of Education and its staff, the Department of Public Instruction, for professional comment and evaluation. The State Board was then to recommend to the Court the proposals it thought best.[5] These original suggestions, some nineteen in number were submitted to the Court in August, 1975.[6]

3. Evans v. Buchanan, 393 F. Supp. 428 (D. Del. 1975).

4. The original parties before the Court included the purported class of black children of Wilmington, and the State Board of Education. The Wilmington School Board intervened as a party plaintiff in the liability phase, and has continued in the remedy phase of the hearings. A group representing the interests of Hispanic and bilingual children [hereinafter "Hispanic Intervenors"] was permitted to intervene by the Court in the remedy phase solely for the purpose of protecting the bilingual program as it presently operates from disruption by any remedy ordered. *See* Transcript of Hearings of the Remedy Phase at 203-04 [hereinafter "Tr. ....."]. The plaintiff class representing black children has not previously been certified under Rule 23, Fed. R. Civ. Proc., and a motion is pending before the Court concerning whether the named representatives and their attorneys adequately and fairly represent the interests of the purported class. *See, infra, Part II.*

The Court after its first opinion in this matter, and in light of the decision in *Milliken*, allowed each of the surrounding suburban school districts to intervene as party defendants. 393 F. Supp. at 430, and n. 1. In addition to the districts named therein, the New Castle County Vocational-Technical School Board has intervened in the remedy phase. Other interested groups, including groups of concerned parents on various sides of the issue; teachers' unions; and special committees have been permitted to take part as amici, by filings briefs only.



Three weeks of evidentiary hearings followed. During the course of those hearings, additions, changes and shifts in emphasis were made to many of the plans. Those presently before the Court, therefore, differ in several respects from those originally submitted. All the factual and legal issues have been briefed, and the matter is ready for decision.

## I. *Factual Background.*

There is no need to discuss here either the prior history of segregated schools in Delaware or New Castle County, nor to recount in detail the prior findings of this Court, since they are set out in prior opinions.[7] Nonetheless, a short discussion of

5. Throughout the course of this litigation, the Courts have continually held that the primary burden of the duty to segregate rests with the State Board. *See, e.g.*, 393 F. Supp. at 430.

It was also apparent that any plans submitted should be reviewed by professional educators in order to sift out those plans which were unworkable.

6. The proposals were developed by the professional staff of the State Board; other professional educators; individual citizens and interested groups. See Docket Items No. 332-41.

7. *See* 393 F. Supp. 428 *and* 379 F. Supp. 1218. It should be noted that at the time of Brown v. Board of Education [Brown I], 347 U. S. 483 (1954), Delaware by statute required the maintenance of separate schools; and Gebhart v. Belton, 91 A. 2d 137 (Del. 1952) (holding that separate schools were "unequal" under *Plessy* v. *Ferguson*) was a companion case to *Brown I*. Since that time, there have been eleven reported decisions by this Court and the Third Circuit with regard to this case. *See*, 393 F. Supp. 428; 379 F. Supp. 1218; 207 F. Supp. 820 (D. Del. 1962); 195 F. Supp. 321 (D. Del. 1961); 281 F. 2d 385 (3rd Cir. 1960); 173 F. Supp. 891 (D. Del. 1959); 172 F. Supp. 508 (D. Del. 1959); 256 F. 2d 688 (3rd Cir. 1958); 152 F. Supp. 886 (D. Del. 1957); 149 F. Supp. 376 (D. Del. 1957); 145 F. Supp. 873 (D. Del. 1956).

In this sense, Delaware has much in common with some other areas which have been the subject of school litigation for much of the last two decades. *See, e.g.*, Leedes & O'Fallon, *School Desegregation in Richmond: A Case History*, 10 Univ. of Rich. L. Rev. 1 (1975).

some of the facts found in prior opinions will aid in the understanding of the opinion.[8]

New Castle County, Delaware, is some four hundred forty-three square miles in area, and northern New Castle County, the area primarily concerned in the opinion, is some two hundred fifty-one square miles in area.[9] This area of Northern New County has a public school population of 80,678 of whom 63,370 or 78.5% are white; 15,722 or 19.4% are black; and the remainder of whom are other minorities including American Indian (89 or .1%), Hispanic (1,120 or 1.38%) and Oriental

8. Several types of abbreviations are used throughout this Opinion to refer to documents introduced in the case, etc. All evidentiary material admitted in the most recent phase of the hearings is identified by the inclusion of the abbreviation "Rem." in the reference, and further identified by the designation of the party introducing them, and the status of the party as defendant or plaintiff. Thus, "D. DPI. Rem. No. 24" refers to Exhibit 24 introduced in the Remedy phase by the State Defendant, the Department of Public Instruction; D. Newark Rem. No. 1 refers to the Exhibit No. 1 introduced by the defendant school district of Newark; Int. Pl. Rem. No. 1 refers to Exhibit No. 1 introduced by the intervening school Board of Wilmington, etc.

Exhibits introduced at prior phases are so identified. Those from the liability phase are identified as "Exh. ..... (liability phase)". Those from prior proceedings not directly concerned with the present relief are identified by the year in which the hearings were held.

9. *See* 393 F. Supp. at 432; PX 23-0 (Liability Hearing) at back cover, for figures and their derivation. The remaining area above the 251 square miles is contained in the Smyrna School District, only half of which lies in New Castle County, and the Appoquinimink School District which occupies the next southernmost tier of the county. *Id.* Only one plan before the Court urged the inclusion of Appoquinimink, and under that plan, it was to be an "attendance area" complete unto itself. *See*, D. DeLaWarr Rem. No. 3.

Since under no plan proposed to the Court would Appoquinimink be a part of any transfer of students, or other remedy of the violation found in the prior opinions, and for other reasons discussed *infra*, pp. 53-54 *et seq.*, the Court has focused its attention on northern New Castle County, comprised of the Districts of Alfred I. DuPont; Alexis I. DuPont; Claymont; Conrad DeLaWarr; Marshallton-McKean; Mount Pleasant; Newark; New Castle-Gunning Bedford; Stanton and Wilmington. The references in this opinion to the Northern New Castle County area, unless otherwise specified, should be understood as descriptive of that area.



(377 or .46%).[10] Within the area, 11,733 or 74.6% of the black students attend school in the Wilmington District. If the only other majority black school district in the area, DeLaWarr, is added to Wilmington, 13,473 or 85.6% of the black students in the northern County area attend school in those two districts.

The apparent contrast can be made even plainer by comparing the Wilmington and DeLaWarr enrollments to the other Northern New Castle County districts. Wilmington Public Schools are 84.7% black; DeLaWarr Public Schools are 54.9% black. No other Northern New Castle District is less than 90% white, and most are significantly higher.[11]

Delaware has a long history of using small school districts, and it became apparent during the post-war period that many of these districts could not support a full educational program. In common with many other states, Delaware has, over the years, consolidated many of these smaller districts, some for financial reasons, others for purposes of required desegregation.[12] A comparison of a map of the school districts comprising the northern County area shows some nineteen schools districts in

10. The figures are derived by calculation from data given in D. DPI. Rem. No. 24, the final enrollment figures for 1975 broken down by race.

11. *See* D. DPI. Rem. No. 24. Alexis I. DuPont is 93.8% white; Alfred I. DuPont is 97.8% white; Claymont is 94.9% white; Conrad, 95.9%; Marshallton-McKean, 94.9%; Mount Pleasant, 96%, New Castle-Gunning Bedford, 92.9%; Newark, 94.2%; Stanton, 98.1%.

It should also be pointed out that the Wilmington schools house 746, or 66.1% of the Hispanic students in the same area.

Of course, the existence of a disparity in the racial characteristics of the population of the city and the suburbs is not a constitutional violation standing alone. Nor do we impose a remedy solely because of the existence of such a disparity. *See* Parts III, IV, *infra*. The foregoing facts are set out solely as an aid and to set the context of the violations previously found.

12. *See generally*, PX 23-K (liability phase) at 12, 13. In some instances, the prior school districts had comprised a "white" district and a "black" district within coterminus boundaries operating separate schools. *See* Evans v. Buchanan, 207 F. Supp. 820 (D. Del. 1962).

1959[13] to twelve districts in the same area today (excluding the separate Vocational-Technical District). The last major reorganization, carried out under the Educational Advancement Act, as described in the last opinion, 393 F. Supp. at 438 *passim*, included the consolidation of several small districts into the presently existing districts.[14] This Court ruled that the exclusion of Wilmington from the process of reorganization by statute was an unconstitutional racial classification, and " 'contributed to the separation of races by . . . redrawing district lines.' "[15]

The variety of plans submitted as remedies may be grouped for analytical convenience into three broad categories. Certain of the plans submitted are "voluntary plans" of varying scope. These include so-called free transfer provisions, and magnet schools. A second category of plans calls for the reorganization of the districts in the area, dividing the black population among the new districts or attendance area and having new school boards make assignments of the students within the area. These plans range from one proposed by the State Board which would divide the area into five new districts; several variations which would include smaller or greater areas; and a county-wide plan designed to consolidate the whole area into one district. The last category is a set of mandatory assignment plans providing for the transfer and transportation of students among the existing districts. The plans vary in the area to be included, in the transportation, and in the amount of time students would actually spend in desegregated experiences.

The Court has considered all these plans as well as the testimony adduced at the hearings, in the light of the requirements of

13. *See* State's Exhibit 8 (1959 hearings).

14. *See* PX 23-0 (liability phase), where the frontpiece describes the changes as *inter alia*, the Middletown and Odessa Districts being combined to form Appoquinimink; H. C. Conrad, Oak Grove, Richardson Park and Newport being combined to form the Conrad Area District; Arden and Mount Pleasant being combined to form the present Mount Pleasant District; and Stanton and Dickinson being combined to form the present Stanton District.

15. *See* 393 F. Supp. at 431-43, 446, *quoting Milliken.*



*Milliken*[16] and *Swann*,[17] and on that basis has determined the remedy to be followed here.

## II. *Class Representation.*

The State Board of Education urges that the present class plaintiffs are not properly before the Court. The motion was brought on two grounds: first, that the named representatives of the class had left or been graduated from the Wilmington School System, and therefore the issues were mooted as to them;[18] second, that in any event, at least insofar as remedy was concerned, the named plaintiffs and their counsel did not fully, fairly and adequately represent the interests of the class, since (it was alleged) not all black school children and their parents in Wilmington desired particular forms of remedy favored by the representatives.[19]

16. 418 U. S. 717, 744-46 (1974).

17. Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1 (1971) ("Swann").

18. *See* Indianapolis Board of School Comm'rs. v. Jacobs, 420 U. S. 128 (1975); DeFunis v. Odegaard, 416 U. S. 312 (1974). *But see* Sosna v. Iowa, 419 U. S. 393 (1975); Franks v. Bowman Transp. Co., ..... U. S. ....., 44 U. S. L. W. 4356, 4357-58 (U. S. March 24, 1976).

We consider that the "named representatives" are those members of the purported class who continue to have standing by reason of the present enrollment of their children in the public schools, *see* note 19, *infra*.

19. Prior to this phase of the case, the action had been treated by all concerned as a proper class action. *See, e.g.*, 379 F. Supp. at 1219; 393 F. Supp. at 446. The only issue we need determine is whether the named plaintiffs continue fairly and adequately to represent the interests of the class.

There has not been a prior determination that the action could proceed as a class action, as required by Rule 23(c), since the action was commenced before the amendments to the Rule in 1966; that is, at a time when no such requirement was present. *See*, 3B Moore's Federal Practice, ¶¶ 23.02-1, 23.50. The present phase arises under the continuing jurisdiction of the Court over the case, 379 F. Supp. at 1220; and no separate certification was sought or made.

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Professor Moore lists four categories which the Court must consider before determining that the proposed representation is adequate: (1) that the interests be "coextensive"; (2) that the interests not be "antagonistic"; (3) the proportion of the named representatives to the class as a whole; and (4) any facts bearing upon the ability of the named representative to speak for the class as a whole.[20] In addition to those factors, the Court notes that the present action must continue in any event, since the Wilmington School Board intervened as a party plaintiff and has full right to pursue the action.[21] Moreover, even if the named representatives were to be found to be "unrepresentative" of *all* Wilmington school children, they might well represent a substantial sub-class of the group. *See* Rule 23(c)(4).

Here it would appear that the interests are "coextensive", since all the potential plaintiffs have made clear that they desire an end to segregatory actions on the part of the State. The point pressed by the State is that because some Wilmington parents of black children do not support the plan favored by the named plaintiffs, "antagonistic" interests are present, and therefore, the class is

*(Continued from preceding page)*

We note that this action does not raise all the questions possible under Rule 23. The potential class of all or a substantial portion of the school children of Wilmington meets the requirements of numerousity, common questions of law and fact, typical claims and defenses; and it is clear that the State Board has acted or refused to act on grounds generally applicable to the entire class, and there exists the danger of inconsistent adjudications or single actions being dispositive of rights. *See* Fed. R. Civ. Proc. Rule 23(a), (b)(1) and (2). Nor has there been any serious dispute of those facts.

The named plaintiffs have established by affidavit that some of their children remain in the system, and the State Board has not pressed the point of mootness. It is clear to us that the jurisdictional requirement of case of controversy which is inherent in the mootness issue has been satisfied. It cannot be questioned that there exists sufficient adversity between the parties to meet the requirements of a concrete sharpening of issues. *See* Franks v. Bowman Transp. Co., *supra*, ..... U. S. ....., 44 U. S. L. W. 4356, at 4358.

20. 3B Moore's Federal Practice, ¶ 23.07[1] at 23-352-53.

21. *Cf.*, Sosna v. Iowa, *supra*, 419 U. S. at 399.



improperly represented. First, it is not clear that in these circumstances, the exact nature of the remedy proposed is an interest which cuts to the subject matter of the suit. *See generally*, 3B Moore's Federal Practice ¶ 23.07[3] at 23-404. All potential representatives of plaintiffs who have appeared before the Court have agreed that some remedy is required, and all seek relatively broad remedies.[22]

The remedy ordered by this Court must of necessity apply to all black children within the City. Since any remedy ordered in favor of the purported sub-group represented by the named plaintiffs would be determinative of the rights of all, the question is really not the antagonism of interests, but whether the Court has had a full and fair presentation of all possible views on the matter. We, therefore, hold that the named representatives are at the very least part of a class whose rights have been violated. Through the presentations of all parties to this suit, and that of all amici, the Court has been thoroughly informed on the differing views on remedy. The action may therefore continue as a class action, and the class will continue to be that class whose rights were violated, the school children of Wilmington. Should it, anytime in the future, appear that antagonistic interests would prevent fair adjudication, the Court may take the necessary steps of requiring the addition of new parties to fill any representation "gaps". *See* Rule 23(d) Fed. R. Civ. Proc.

### III. *The Legal Standard of Milliken and Swann.*

*Brown* v. *Board of Education*, 347 U. S. 483 (1954), was a major step in American Constitutional Law, and it is from that case primarily, and its progeny *Green* v. *New Kent County Board of Education*, 391 U. S. 430 (1968), and *Keyes* v. *Denver*

22. The "Committee for the Improvement of Education", a group to which the State Board points as epitomizing the antagonism of interests, submitted a document in the nature of an amicus brief, which urges, *inter alia*, a consolidation of districts, and the creation of mandatory minority housing programs in the suburbs. *See* Docket Item No. 430 at A-2, A-3.

*School District No. 1*, 413 U. S. 189 (1973), that the determination of the existence of a violation of the rights of children in segregated schools is made. That determination has been made in this case, in opinions that date from 1956 to 1975.[23] *Milliken* and *Swann* deal not with the existence of a violation, but with the standards which a court must follow in remedying the violation which it has found. They are expressions not of constitutional law, but of the proper scope of equitable discretion.[24]

Moreover, *Milliken* and *Swann* must not be read in isolation. As the Court in *Milliken* noted, harking back to both *Swann* and *Brown II*,[25] the flexibility and pragmatic judgment of the chancellor of equity have been the consistent pattern of determining remedy in desegregation cases. *Milliken* and *Swann* are not, therefore, substantial departures from prior case law, nor steps backward in the development of remedies for desegregation. Rather, they establish the limits of the equitable discretion to be exercised by the court.[26]

Thus, *Milliken* makes plain that the remedy to be ordered must be commensurate with the scope of the violation which has been found.[27] And insofar as the remedy to be applied is the desegregation of schools, the violation which was found must be proximately related to the operation of the school system, or to its enrollment.[28] Further, if it is shown that the substantial disparity in enrollment patterns between districts was substantially

23. *See* note 7, supra.

24. *See* Hills v. Gautreaux, ..... U. S. ....., 44 U. S. L. W. 4480, at 4483 (U. S. April 20, 1976); *Milliken*, 418 U. S. at 737-38 (plurality opinion) and 753 (Stewart, J. concurring); *and Swann*, 402 U. S. at 15.

25. Brown v. Board of Education, 349 U. S. 294 (1955).

26. *See Gautreaux*, 44 U. S. L. W. at 4483.

27. 418 U. S. at 744-45; *and see, Gautreaux*, 44 U. S. L. W. at 4483.

28. 418 U. S. at 744-46 (plurality opinion); 418 U. S. at 755-56 (Stewart, J. concurring).



caused by governmental activity, an inter-district remedy may be considered.[29]

The mere fact that an inter-district violation occurred does not necessarily require an inter-district remedy. It is too longstanding a rule of equity to require citation that although equity will give complete relief, it will limit the exercise of its power to a remedy which is reasonably necessary and likely to succeed. Moreover, an inter-district violation having only de minimis effects will not require school desegregation across the district lines. *See* 418 U. S. at 750.

We need not catalogue the set of violations with regard to housing and zoning set forth in the last opinion affirmed by the Supreme Court.[30] Nor need we rehearse the reasons why we held the Educational Advancement Act to be an unconstitutional "redrawing of district lines."[31] It suffices to say that the acts described in the prior opinions were the acts of the State and its subdivisions, and had a substantial, not a de minimis, effect on the enrollment patterns of the separate districts.[32]

The suburban districts have attempted to foreclose the application of an inter-district remedy including them by citing the prior finding of this Court that each of them was at present operating a unitary system, and urging that they had committed no constitutional violation.[33] Such a defense is inadequate where, as here, the local boards are creatures of the State, and it was the State Legislature and the State Board of Education

29. "Specifically, it must be shown that racially discriminatory acts of the state . . . have been a substantial cause of interdistrict segregation." 418 U. S. at 745.

And *see*, "The Constitution simply does not allow federal courts to attempt to change that situation unless and until it is shown that the State, or its political subdivisions, have contributed to cause the situation to exist." 418 U. S. at 756, n. 2 (Stewart, J. concurring).

30. 393 F. Supp. at 433-38, *aff'd., per curiam*, ..... U. S. ....., 44 U. S. L. W. 3299 (U. S. November 17, 1975).

31. *Idem.* at 439-46.

32 *See* note 29, *supra.*

33. *Cf., Gautreaux, supra*, 44 U. S. L. W. at 4483.

which acted in a fashion which is a substantial and proximate cause of the existing disparity in racial enrollments in the districts of Northern New Castle County. The fact that birth rates, or population shifts, or other factors[34] also contributed to a degree will not relieve the State from its obligation to desegregate.[35] The remedy for the violation must include school districts which are its instrumentalities and which were the product of one of the violations. The remedy for the acts of the State may be inconvenient, burdensome, and expensive to some of those instrumentalities. But neither inconvenience, burden nor expense can negate the duty of the Court to order effective relief when a not insubstantial violation has been shown.[36]

The suburban districts have urged that under the standard laid down by the plurality opinion in *Milliken*, no inter-district remedy can be ordered to include them, unless they themselves have been guilty of a violation.[37] The suburban districts emphasize that it was not their actions which had any segregatory effect in Wilmington, and that we did not in the last opinion hold that the Educational Advancement Act was drawn with an actual segregatory intent. *See, Milliken, supra,* 418 U. S. at 745.[38] That claim, however, must fail, because it misread both the language of *Milliken* and the prior holding of this Court. First, the Chief Justice's opinion in *Milliken* made clear that action by the *State* which caused inter-district segregation would be sufficient to allow an inter-district remedy.[39] The further specification of the deliberate drawing of lines to achieve segregation was by way of example, not limitation. As the Supreme Court made clear in *Wright* v. *Council of Emporia*, it is not the purpose for which the lines are drawn that is determinative of whether they work an impermissible classification, but whether the *effect* is such that they do. *See*, 407 U. S. 451, at 461-62 (1972). The concurring opinion of Mr. Justice Stewart in *Milliken*, necessary for the majority holding, makes it even clearer that an inter-district remedy may follow wherever it was shown that "state officials had contributed to the separation of the races by drawing or redrawing school district lines." 418 U. S. at 755. The activities found in the prior opinion clearly met that standard, and those findings have been affirmed.[40] Nor is the liability of the State merely derivative. *See Milliken*, 418 U. S. at 748. Rather, here the State actively contributed to the separation of the races.[41] Nor do we find Mr. Justice Stewart's opinion in *Gautreaux* to be a signficant change from his earlier view. Where the State has contributed to the separation of races by redrawing school lines, necessarily the districts on both sides of the lines are part of the violation itself, and exclusion of the suburban districts cannot be predicated on their own purported innocence when their present lines were drawn or redrawn in the course of a violation.

Moreover, the last opinion also found that although the suburban districts now provided a unitary system for all children within their districts, past activity on their part had not been so confined.[42] The actions of the suburban districts therefore

34. *See Milliken,* 418 U. S. at 756, n. 2 (Stewart, J. concurring).

35. *Id.*

36. *Milliken,* 418 U. S. at 744-45; *Swann,* 402 U. S. at 28.

37. *See Gautreaux,* 44 U. S. L. W. at 4483-84.

38. "Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race."

39. *Id.*

40. 393 F. Supp. 428, *aff'd. per curiam,* 44 U. S. L. W. 3299.

41. *Id.*

42. "Unlike the situations in Detroit, where the suburban districts had never been implicated in *de jure* segregation. . . . and in Richmond, where suburban districts had participated in *de jure* segregation, but independently from the city school system, . . . *de jure* segregation in New Castle County was a cooperative venture involving both city and suburbs. Although the Wilmington School District was predominately white at that time, a desegregation decree could properly have considered city and suburbs together for

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meet the test laid in *Gautreaux* for inter-district relief, independently of the State's actions.[43] For present purposes, it is sufficient to point out, as we found in the last opinion, that despite the separate operation of the systems since the 1950's, the racial characteristics of the city and the suburbs are still inter-related, and the actions of state officials and local officials were sufficient to create an inter-district effect under *Milliken*.[44]

Our duty is to order a remedy which will place the victims of the violation in substantially the position which they would have occupied had the violation not occurred.[45] Prior opinions of the Supreme Court have held unequivocally that where the violation found resulted in the operation of a dual school system, the Court must order the "greatest possible actual degree of desegregation", consistent with the practicalities of the situ-

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purposes of remedy. At that time, in other words, Wilmington and the suburban districts were not meaningfully 'separate and autonomous'." 393 F. Supp. at 437 (citations omitted).

43. *See Gautreaux*, 44 U. S. L. W. at 4483-85. Justice Stewart's emphasis in *Gautreaux* on the independence of local governmental units, and the requirement that federal courts defer to that independence is an echo of that same concern in *Milliken*. *See, Gautreaux*, 44 U. S. L. W. at 4483. Although the local districts in Delaware have great autonomy, the violations here go directly to that autonomy. Thus, at the time when they carried on segregative acts, the local districts did so in such a way as to make clear that they were not so separate from Wilmington and its operations as now to be free from all culpalibity for the remaining effects of the segregatory regime which was never completely abolished. 393 F. Supp. at 437-38. The combination of their prior acts negating complete independence; and the State's actions to create boundaries which favored the existing separation of races is sufficient to show that the lines of independent authority are entitled to less weight here than in *Milliken*. *See Gautreaux*, 44 U. S. L. W. at 4484-85. As we note *infra*, pp. 49-50, we respect the autonomous functioning of the school districts, and we will avoid needless interference with those local operations. We establish here only that the remedy which we order may include the suburban districts, because their existence and their actions were part of the violations which lead to the remedy.

44. *See*, 393 F. Supp. at 438.

45. *Milliken*, 418 U. S. at 746.



ation, *Davis* v. *Mobile County Bd. of School Comm'rs.*, 402 U. S. 33, 37 (1971); and it must do so by plan which is reasonably certain to achieve desegregation now.[46] In light of this standard, we must determine whether sufficiently remedial actual desegregation is possible under a plan which would be confined to the boundaries of the present Wilmington district; what level of desegregation will at a minimum establish that a dual system is no longer operating; how wide a geographical area must be included to accomplish properly that result; and by what method and with what safeguards this result can be accomplished. It is to these questions that we turn next.

## IV. *Wilmington Only Plan.*

All of the defendants in the instant phase of the case have urged vigorously that the Court has no power to order an inter-district remedy absent further findings of inter-district violation. They have also urged that a plan which involves only the Wilmington schools will be adequate to remedy the violations found in the prior opinions. Since a finding that such a plan was adequate would relieve the Court of the necessity of dealing with many vexing questions, we deal with this issue first.[47]

The Wilmington School District, the boundaries of which are coterminus with the city lines presently serves 13,852 students, of whom 11,733 or 84.7% are black and an additional 746 or 5.4% of whom are Hispanic.[48] The system as a whole is therefore 90% minority enrollment. Only two schools within the system are presently majority white: Cedar Hill Elemen-

46. *Gautreaux*, 44 U. S. L. W. at 4484; Green v. Board of Education of New Kent County, 391 U. S. at 439.

47. In its last opinion, this Court was careful to note that it had not considered what scope any remedy would be required to take. 393 F. Supp. at 446, n. 37.

For that reason, the Court sought the submission of a plan that would be confined to the present Wilmington School District. *Id.*

48. *See* D. DPI. Rem. 24 at 5.

tary School which is 73.4% white; and Highlands Community School which is 59.6% white.[49] All of the other schools are not only majority black, but heavily so. As we noted in an earlier opinion, some of those schools which were black shools *de jure* in 1954 have continued to have enrollments over 91% black.[50]

The plan proposed to cluster certain of the elementary schools in an effort to reduce the black enrollment; and to redraw the "feeder" lines for the middle schools, and the attendance boundaries of the two high schools.[51] It was drawn in great part by the Wilmington School Board, although some changes and additions were made by the staff of the State Department of Public Instruction.[52] As submitted, the plan is necessarily limited in its effect by the population characteristics of the area it would cover.[53] Nonetheless, it would result in the schools which were formerly *de jure* minority schools being desegregated to the extent of bringing their enrollments below 90% black for the first time.[54] Other schools would, however, remain more than 90% minority.[55] We must, therefore, determine whether such a level

49. *Id.*

50. *See* 379 F. Supp. at 1223, and n. 8. The present enrollments of schools listed in that footnote continue to be over 95% black, except for the former Howard High School. Elbert Elementary is 97.6% black; Stubbs Elementary is 97.6% black; Drew Elementary is 98.2% black; and Bancroft Middle School is 96.3% black. The Howard High School has been reopened as a vocational-technical school, and is now 85.2% black. The Court notes that the only other vocational-technical school in the area presently open (a third will open next fall) is 93.2% white.

51. *See* D. DPI. Rem. No. 19.

52. Tr. 1506-07.

53. *See* p. 21, *supra;* Tr. 1507.

54. Under the proposal, Stubbs would become 86.5% black; Drew would become 75.7% black; Elbert would become 79.8% black; and Bancroft Middle School would become 88.1% black. *See* D. DPI. Rem. No. 19 at 14, 16 and 22.

55. *E.g.*, Cool Springs Elementary would be 92.9% black; Harlan Elementary would be 93.9% black; Highlands Community

*(Continued on next page)*



of minority enrollment in the context of the present case would be sufficient to constitute a remedy for the violations found.

The Supreme Court has made it clear that there is no magic in percentages of minority enrollment. See *Swann*, 402 U. S. at 25-26. *Milliken*, 418 U. S. at 740-41 & n. 19, 747 n. 22; 756 (Stewart J. concurring). Such percentages are merely the starting point in the formulation of a remedy and the determination of whether the remedy is complete. *Swann*, 402 U. S. at 25. Moreover, such figures are meaningless unless seen in the proper context: they must be weighed in light of the characteristics of the community. *Id.; and see Wright* v. *Council of City of Emporia*, 407 U. S. at 464-65 (1974).

If the community whose characteristics would be determinative of the weight to be given to the enrollment figures were seen as Wilmington alone, such a plan might afford the relief which the Constitution requires. The fact that the schools would continue to be heavily black while the suburbs would be white would not alone require an inter-district remedy. *Milliken*, 418 U. S. at 756 (Stewart J. concurring). This Court, however, cannot use such a narrow view of the community, in light of the scope of the prior violations. *Gautreaux*, 44 U. S. L. W. at 4485.

The Supreme Court has made it clear that the determination of the violation is a key factor in determining remedy. *Swann*, 402 U. S. at 16; *Milliken*, 418 U. S. at 744. We have already determined that the State had not fulfilled its mandate to operate a unitary school system;[56] and that in the past the area com-

*(Continued from preceding page)*

School, containing only the fifth grade of one "cluster" would be 93.5% black, while two of its components for the lower grades (K-4), Gray and North East, would be 92.3% and 90% black respectively. D. DPI. Rem. No. 19 at 13, 14.

The Warner Middle School would be 91.9% black; and the Burnett Middle School would be 92.3% black. *Id.* at 21, 23.

P. S. DuPont High School would be 91.1% black. *Id.* at 27.

56. 379 F. Supp. at 1223.

prising the suburban and city districts was treated jointly for many school purposes, including the transportation of black students to *de jure* segregated schools.[57] In these circumstances, it is apparent that the entire northern New Castle area must be treated as one community in terms of its population characteristics, because that is the way it was perceived and treated by the State and its citizenry. *Gautreaux*, 44 U. S. L. W. at 4485; *Keyes* v. *Denver School District No. 1*, 413 U. S. 189 (1973). While other districts in this area were being consolidated or considered for consolidation, the Wilmington District was expressly reserved from the exercise of discretion by the State Board, and that reservation "played a significant part in maintaining the racial identifiability of the Wilmington and suburban New Castle County school districts."[58] Moreover, state action was also found to be responsible here for the racial identifiability of the suburbs and the city, through enforcement of racial covenants, zoning and encouragement and support of private discrimination in housing.[59] For these reasons, the effectiveness of any plan must be judged by how well it terminates racial identifiability of the schools in light of the population characteristics of the northern county area. *Gautreaux*, 44 U. S. L. W. at 4485. *Cf., Swann*, at 25.[60] To hold otherwise in the present context would mean that state officials could, by their actions, effectuate a pattern of discrimination in schools and housing, then argue that the area had become divided into separate communities identified by them, and that only the population characteristics of their selected area need be taken into account.

57. 393 F. Supp. at 433.

58. 393 F. Supp. at 445.

59. 393 F. Supp. at 437-38.

60. "As we said in *Green* [v. New Kent County School Board, 391 U. S. 430], a school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness. Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations."



The school population of Northern New Castle County is presently 78.5% white.[61] A plan limited to the confines of Wilmington would result in city schools that would be, for the most part, 85% to 95% black, while the suburban schools, other than those of DeLaWarr, remained overwhelmingly white.[62] Thus, a Wilmington-only plan would not significantly affect the present racial identifiability of the Wilmington or suburban schools. It is the duty of the State to bring forward a plan that will achieve desegregation, to the "greatest possible actual degree", *Swann*, 402 U. S. at 26; and here that duty will not have been carried out when the schools will maintain their former racial identity.

We do not here decide that the fact that Wilmington would be a black system surrounded by white systems is sufficient to call for an inter-district remedy. *See Milliken*, 418 U. S. at 735, 747 and n. 22. Nor do we determine that a majority black system is of necessity segregated. *See United States* v. *Scotland Neck Board of Education*, 407 U. S. 484 (1972). Rather, we hold only that insofar as the Wilmington-only plan is concerned, where inter-district violations have been found, it is appropriate to look at the population of the area over which the violations occurred to determine in the first instance whether the plan submitted results in actual desegregation. *See Gautreaux*, 44 U. S. L. W. at 4485. Where the plan would result in the maintenance of the traditional racial identity previously established by State action, and that disparity in racial enrollments remains substantial, it cannot be said that it results in the disestablishment of a dual system. *See United States* v. *Scotland Neck Board of Education*, 407 U. S. 484, 490. We, therefore, hold that under the proof developed before us, a Wilmington-only plan would not remedy the violations previously found, and that we must go on to consider an inter-district remedy.

61. *See* p. 6, *supra*.

62. See, pp. 6, 23, *supra*.

V. *Proposed Inter-District Remedies.*

The Court has had before it several different types of plans for remedying the violations found, some of which have been recommended in varying degrees by the parties, and others of which were proposed by various individuals and submitted through the State Board. We will not take the time to list seriatim all the various proposals, which are part of the record, but it is appropriate to note that not one of the plans submitted has been found to be completely acceptable taking into consideration all the practicalities of the situation. *Davis* v. *Mobile County Bd. of School Comm'rs.*, 402 U. S. 33, 37 (1971). We make the following findings with regard to the various types of inter-district plans.

A. *Voluntary Plans.*

The category of voluntary plans includes several different proposals. A proposal on which much evidence was adduced calls for the creation by the suburban districts and Wilmington of so-called "magnet schools" to serve five "zones" which would be drawn up by combining a portion of Wilmington with one or more suburban districts.[63] The racial make-up of the school population of each zone would approximate the racial characteristics of the county as a whole.[64] All of the presently existing school districts would be retained, and, in addition, each "zone" would have an "Advisory Committee" which would be responsible for implementation of magnet proposals. The actual operation of individual magnet programs in schools would be the

63. This is the so-called "Zone Transfer Plan", *see* D. DPI. Rem. No. 8. In each instance, except one, a part of Wilmington would be joined to two or more suburban districts. In one instance, the zone would include only one suburban district.

64. The lines were drawn so as to equalize substantially racial enrollments, tax assessments and populations, while maintaining geographical contiguity and the identity of existing suburban districts. *See* Tr. at 213-17.



responsibility of the district in which the building was physically located. D. DPI. Rem. No. 8 at 5-6.[65]

The central concept in all of these voluntary proposals is that some schools are or can be made so attractive that students will enroll in those schools for the particular program rather than in the neighborhood school to which they would ordinarily have been assigned. The magnet schools proposed are characteristic of the concept: every school in every district would eventually house some sort of magnet program thought by the residents to be both educationally desirable and desegregatory in its attraction.[66] As originally advanced, no binding racial quotas were to be included, although the State Board agreed at trial that they might be used in addition to the program designs. Educators who testified in favor of the plan all agreed that they hoped the plan would work but that there was no way that success could be guaranteed. They sought instead, time to try the plan.[67]

In determining whether any voluntary plan developed in the testimony meets the requirements of a desegregation plan, the Court has had to consider the goals which *any* plan ordered by the Court would be required to meet; and then determine whether

65. Other familiar types of voluntary programs were proposed initially by various interested persons or groups, but were not carried forward by the State Board before the Court. These included majority-to-minority transfer programs; and the amendment of state law to allow transfers among districts. 14 Del. C. § 603 presently provides for payment of "tuition" when a child who is a resident of one district attends school in another district. Subsection (c) allows a student who is a student who is a resident of Wilmington, Alexis I. DuPont, Mount Pleasant, or Alfred I. DuPont to attend school in ny of those districts, provided that the board of the "receiving" district approves the application for transfer. The proposed amendment would be designed to restrict the approval power to reasons of space or reasonable disciplinary requirements, to prevent exclusion on racial grounds, and to extend the number of districts involved.

66. *See* Tr. 233-40. That is, each of the schools would be not only educationally sound, but also be seen by sufficient numbers of white and black parents and students as desirable enough to cause the voluntary enrollment of the school to be desegregated.

67. *See, e.g.*, Tr. 554, 682-83.

the plan proposed offers adequate assurance that the goals would be met. The Supreme Court has made clear that time is a commodity whose place has become restricted in desegregation cases. " 'The time for mere "deliberate speed" has run out. . . . The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.' "[68] Moreover, the plan must not offer merely a hope of some desegregation at some time in the future. "The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one race schools."[69]

The magnet plans proposed here simply do not measure up to those requirements. We do not hold that magnet plans are incapable of achieving reasonable levels of desegregation. In a different context, with different safeguards, such a plan might be sufficient. *See Hart* v. *Community School Board*, 512 F. 2d 37 (2d Cir. 1975). However, in other contexts, magnet plans similar to the one here have been disapproved. *See, Brinkman* v. *Gilligan*, 503 F. 2d 684, 704 (6th Cir. 1974); *Spangler* v. *Pasadena Board of Education*, 375 F. Supp. 1304, 1307 (C. D. Cal. 1974), *aff'd.*, 519 F. 2d 430, 438-39 (9th Cir. 1975), *cert. granted*, ..... U. S. ....., 44 U. S. L. W. 3279 (U. S. November 11, 1975). The magnet system called to the attention of the Court by the State Board, that beginning operation in Houston, shows relatively little success in actually desegregating schools: it has in fact resulted in some schools receiving an even greater minority enrollment.[70] The suburban districts which brought forward "expansions" of the outline made by the State were unable to assure the Court that it would actually result in significant desegregation.[71] Moreover, the State Board failed to cost out its

68. Green v. New Kent County School Board, 391 U. S. 430, 438-39 (1968) (emphasis in the original) (citations omitted).

69. *Swann. supra*, 402 U. S. at 26.

70. *See* D. DPI. Rem. Nos. 12, 13, 14. Tr. 585-90, 616-17.

71. *See, e.g.*, Tr. 792-97, 682.



proposal adequately.[72] In light of the cost of operating programs in other cities, the cost figures given to the Court in the "expansions" seem unreliable indeed.[73]

The magnet program is heavily dependent upon the unique drawing power of particular programs and faculty to attract and hold students. There is necessarily a limited market for special programs.[74] While magnets might be used to desegregate individual schools otherwise not part of a segregated system, their use as the sole means of system-wide desegregation is decidedly unpromising. *See Bradley* v. *Milliken*, 402 F. Supp. 1096, 1147 (E. D. Mich. 1975). Absent a showing that significant desegregation *must* occur *in fact* as a part of the operation of magnet schools, the Court cannot accept the plan. No such showing has been made.

The other voluntary plans proposed to the Court suffer from similar defects. As *Green, supra*, made clear, voluntary programs are unacceptable where there are "reasonably available other ways . . . promising speedier and more effective conversion to a unitary, nonracial school system. . . ."[75] None of the other voluntary plans proposed promises realistically to work effectively now, and those plans lack even the modicum of attraction inherent in the magnet system. Thus, assuming that a voluntary program could be developed in an effort to meet reasonable desegregation goals, the proposals presented to this Court are not adequate to assure meeting that goal, and are therefore inadequate as remedies.

72. *See* Tr. 302-04, 392, 400, 437-38.

73. For example, to operate forty-six magnet programs in Houston will cost approximately $9.3 million. The present 34 programs are funded at $5 million. D. DPI. Rem. No. 12 at 195; Tr. 527-28.

The proposed programs here are funded at well below that level. *See*, D. Mt. Pl. Rem. No. 1 at 104 and D. Mt. Pl. Rem. No. 1A at 3; D. Alf. I. Rem. No. 1 at A-7; D. Stanton Rem. No. 1 at 39, and D. Alexis I. Rem. No. 1 at 24, 25.

74. *See, e.g.*, Tr. at 95.

75. Green v. New Kent County School Board, 391 U. S. at 441.

B. Cluster and Center Plans.

The Wilmington School Board, as Intervening Plaintiff, submitted a major proposal ["the Wilmington Metro Plan"] which would require the transportation of a sufficient number of students across the district lines to desegregate some of the area schools. *See*, Int. P. Rem. No. 1, 8. The enrollments would be determined by "clustering" particular city schools with given suburban schools, so that each school within the cluster would have approximately the same racial characteristics. In order to accommodate all the children involved and to spread the burden among suburban and city children, grade patterns would be altered so that schools would serve part of a given elementary or high school level.[76]

The Wilmington Metro Plan proposes that all of the existing districts be retained, at least initially, to insure the fair treatment of the students being transferred, and to assist in the organizational transition from a dual to a unitary system.

The State Board and the suburban districts are very strongly opposed to the cluster plan, denominating it "forced busing" which they call a "bankrupt concept". The Wilmington School Board takes the position that it is the only plan which actually insures the re-assignment of students to desegregated schools, and is therefore the only plan presented to the Court which meets the requirements of *Green*.[77]

The only other plan submitted to the Court which effectively reassigns students is the so-called "Center Plan" submitted by the Alfred I. DuPont School District.[78] The Center Plan involves the

76. Thus, for example, a city school presently serving grades K-6, would be clustered with two or more suburban schools serving the same grade levels. Under the plan, the city school might then house all the K-2 students presently enrolled in all three schools, and the suburban schools would divide the remaining grades and students between them.

77. *See*, pp. 30-31, *supra*.

78. *See* D. Alfred I. Rem. No. 2.





part-time re-assignment of elementary children, so that those in grades one through six would attend neighborhood schools for all of their academic subjects, and for one day per week would meet in desegregated "Centers" for training in *e.g.*, physical education, music and art. Children in the seventh through the twelfth grades would be mandatorily assigned full time to desegregated schools, all seventh graders in the area being taught in the present city schools, and all eighth through twelfth grades being taught in present suburban schools.[79]

Where desegregation is to take place in one school district, the use of clusters and pairings, as well as other sorts of re-assignment and transportation schemes offer the best guarantee that actual desegregation will take place. The Supreme Court has made it clear that such plans are a proper part of an overall remedy. *See, Swann* at 29-30.[80] But the Court has also made it clear that all of the circumstances of a particular locality are to be taken into account when the District Court makes its determination of what plan to order.[81]

The cluster and center plans both include inter-district assignments. We must agree with the Supreme Court that an inter-district transportation plan standing alone is difficult to administer, and fraught with complex problems unsuited for judicial determination.[82] In particular, we note that in Delaware

79. *See, id. and* Tr. 2775-85.

80. "The importance of bus transportation as a normal and accepted tool of educational policy is readily discernible in this and the companion case. . . . The District Court's conclusion that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system is supported by the record. . . .

. . . In these circumstances, we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to walk-in schools." 402 U. S. at 29-30.

81. *See Swann*, 402 U. S. at 28-32.

82. *Milliken*, 418 U. S. at 742-44, catalogues some of the major problems.

local districts have had a long history of control over curriculum and text choice,[83] as well as the common governmental functions of setting and levying taxes, and maintaining communication and accountability between administrators and parents.[84] The transportation schemes would endanger all of these functions, or make their performance much more difficult. The mere fact of extra administrative burden is not, of course, sufficient to make a plan so impractical or burdensome as to be beyond the equity power of the Court.[85] Nonetheless, where methods are available which will accomplish the result without the associated problems, the Court, as a matter of equitable discretion, should follow that course which will require its intervention in the least possible degree which will insure compliance. *See generally, Milliken*, 418 U. S. 740-45; *Gautreaux*, 44 U. S. L. W. 4483-85.

The Wilmington Metro Plan, though containing many admirable features and safeguards with regard to minority rights, would place the Court in the ongoing position of general supervisor of education in New Castle County. In the event of disagreements over curriculum patterns or textbooks, the Court or a master would have to step in. Moreover, the relationship of parents to the school their child attends, and the interests which they take in the operation and policies of that school can be an important determinant of the success of the child in education.[86] Except in the Wilmington and Alexis I. DuPont Districts, school board members are elected. *See* 14 Del. C. §§ 1051, 1062, 1063. The Wilmington Metro Plan would make it much more difficult for individual parents to require accountability from teachers and administrators who are employed by districts other than that of their voting residence. In light of all the circumstances here, the Court cannot in the exercise of equity order the cluster plan as proposed. Transportation schemes, as

83. 14 Del. C. § 1049.
84. 14 Del. C. §§ 1902-23, 1058.
85. *Swann*, 402 U. S. at 28.
86. *See*, Tr. 2836, 2861.



well as the redrawing of attendance lines and other shifts in present patterns of attendance, will undoubtedly be required to desegregate. But such plans are better drawn where the greatest possible degree of control is in the hands of local leaders acting in accordance with constitutional limitations.

The Center Plan suffers from the same defects, at least insofar as it would assign students from one district to schools under the supervision of a district over which their parents have little control or political voice.[87] Moreover, the Center Plan, whatever the purpose of the originators, would place an inequitable burden on the present staff of the Wilmington schools, requiring, for example, that present high school teachers switch to seventh grade, or scramble for the positions which might open up in their field in the suburban districts.[88] In addition, while accomplishing the desegregation of the secondary level schools, the mere part-time desegregation for the elementary grades[89] is inadequate as a final result of a desegregation plan under the standard established by *Green* and *Swann*.[90] *Keyes* v. *Denver School District No. 1*, 521 F. 2d 465, 477-79 (10th Cir. 1975).

No cluster or center plan which has been proposed would meet the test of administrative feasibility which is, in our view, an absolute prerequisite to the long-range success of any remedy.

### C. Reorganization Plans.

The reorganization plans submitted by various parties propose correcting the prior violations by redrawing the boundary lines found to have been drawn improperly. That is, they attempt to combine Wilmington and various of the suburban districts into new consolidated districts. It is expected that the populations of these districts will reflect the racial character of the area as

87. *See* Tr. at 2775-76.
88. *See* Tr. at 2810-12.
89. Tr. at 2803-04, 2805-06, 2808.
90. *See* pp. 30-31, *supra*.

a whole,[91] and that following the effectuation of the remedy, the new districts could assign pupils within their localities on a desegregated basis and otherwise operate a unitary system. The differences among the reorganization plans proposed pose two issues: (1) whether the area should be split into several new districts or consolidated into one large district; and (2) the extent of the geographical area to be included in the reorganization.

The State Board and the suburban districts have introduced a reorganization plan in which the Wilmington District is split into five parts. Five new districts are established, each consisting of one or more suburban districts and one-fifth of Wilmington.[92] Two of the suburban districts have sought to include in the five district reorganization plan the Newark District.[93] Other than changing the pupil and geographical ranges, the inclusion or exclusion of Newark would not affect the operation of the plan. We will, therefore, discuss the plan in light of its other characteristics, since we deal *infra* with the extent of geographical area to be required.[94]

After reorganization, the operation of the proposed five districts would be as present Delaware law requires. New elections for board members would eventually have to be held, but in virtually all respects, the proposal follows the reorganization scheme approved by the State Legislature and described in the

91. *See* Tr. 213. They were also drawn to allow equalization of tax bases, sufficient space in existing facilities for the projected enrollments, etc. *Id.* 213-17.

92. *See* D. DPI. Rem. No. 18.

93. *See* D. Mt. Pl. Rem. No. 9. The "laboring oar" of this dispute was borne by the attorneys for Mount Pleasant, Conrad and Newark. Mount Pleasant and Conrad sought to include Newark in order to prevent it from becoming or remaining a white haven in an otherwise desegregated area, and to spread the associated tax burden. Newark sought to narrow the area, at least to its exclusion. The DeLaWarr District, favoring a county-wide plan, also provided some evidence on the inclusion of Newark.

94. *See* Part VI A, p. 53, *infra*.



last opinion.[95] The only departures from the existing state scheme set forth in 14 Del. C. §§ 1001, *et seq.*, would be that in contravention of provisions of the Act, Wilmington would be split: enrollments in certain of the reorganized districts would exceed 12,000;[96] and the salaries of teachers and staff in the reorganized district would not be "leveled up".[97] The only change required by the inclusion of Newark would be that one or more districts other than Wilmington would be split.[98]

The other major proposal[99] for reorganization was that submitted by the DeLaWarr District, which would require that the whole of New Castle County be included in one school district which would be further divided into four or more attendance areas.[100] The area or district would be supervised by an elected board, and each of the attendance areas would have elected or appointed advisory groups which would maintain

95. *See* 393 F. Supp. at 438, *et seq.*

96. 14 Del. C. § 1004(c)(2), (3) required that only "whole districts" which were contiguous could be joined, and then only if the resulting enrollment of the reorganized district was no greater than 12,000 pupils. According to D. DPI. Rem. No. 18, three of the five reorganized districts proposed would have enrollments in excess of 12,000. *See* D. DPI. Rem. No. 18 at 5.

97. Under the Educational Advancement Act, the salaries of all employees in a reorganized district were set at the level of the highest salary for that position among the former component districts. 14 Del. C. § 1009. This insured that all staff personnel in the new district with equal service and skills would be receiving equal pay.

Such leveling up would be quite expensive, however, at a time when bond issues and tax increases have not met with a favored response by the electorate. For that reason, the State chose not to recommend leveling up as part of its plan. *See* Tr. 1558-61.

98. *See* D. Mt. Pl. Rem. Nos. 7, 9.

99. The Wilmington Board agreed through certain of its witnesses that a reorganization of the desegregation area would eventually prove necessary. *See* Tr. 2361, 2370. The feeling of the Wilmington Board, not unlike that of this Court, was that the State Legislature or its delegates should be the appropriate agency to make the determinations of district lines, etc. Since no details of a "Wilmington redistricting proposal" were submitted or otherwise put before the Court, we do not comment further upon it.

100. *See* D. DeLaWarr Rem. Nos. 2, 3.

contact with the citizenry. It is the position of DeLaWarr that by including the entire county, several educational benefits would be achieved as well as desegregation of the schools. The tax assessments and collections across the county would be equalized for all the schools, and the population of the entire county would necessarily be reflected in the population of the school district and the schools. If the population were to shift in ways not now foreseen, the county-wide district could shift attendance zones to ensure the continued operation of a unitary system over the whole county.[101]

The suburban districts other than DeLaWarr do not favor a reorganization, but would prefer it to transportation plans implemented without such shift in control. All of the parties, except DeLaWarr, have generally opposed the county-wide plan as creating a major shift in the way Delaware has historically operated its schools.[102] DeLaWarr's preference for its plan is at least partially based on its own unique position. Among the districts in New Castle County, DeLaWarr is relatively poor since not only is its population of a substantially lower income level, but a major part of the district's tax base is exempt from taxation because of public uses of the property, including the approaches to the Delaware Memorial Bridges, etc. The change to a county-wide system would enable DeLaWarr to benefit from the better tax assessment and property ratios of the other suburban districts.

The power of the Court to order a reorganization would not appear to be in doubt. Justice Stewart's concurring opinion in *Milliken* makes explicit reference to a decree calling for the restructuring of districts as an appropriate remedy for certain kinds of violations. *See* 418 U. S. at 755; *and see Gautreaux*, 44 U. S. L. W. 4484 and n. 12. The Supreme Court has made clear in other contexts that the courts have the power to prevent a

101. *See* D. DeLaWarr Rem. No. 2 at 7-10; *cf., e.g.*, Tr. at 1045 A, 1045 B.

102. *See, e.g.*, Tr. at 451-52.



reorganization or creation of new districts when to allow the shift would recreate dual systems. *See Wright* v. *Council of City of Emporia*, 407 U. S. 451 (1972); *United States* v. *Scotland Neck Board of Education*, 407 U. S. 484 (1972). Moreover, as noted by the state defendants, reorganization may well be peculiarly suited as the remedy in the instant case, where one of the violations which was found was the prior improper reorganization of districts including some of those now before the Court.[103] The standard formulated by the Court is that the remedial decree should be directed toward placing the victims of the violation in the position they would have occupied had the violation not occurred.[104] Where one of the violations was the isolation of Wilmington from the possibility of union with other districts, *prima facie* an appropriate remedy would be ordering of the union to take place.

We have determined that the violations found in the instant case present a situation where some sort of consolidation or reorganization is required. There is ample testimony that without reorganization of some kind, no plan will be able to function in an administratively feasible manner.[105] We will, therefore, require the implementation of a reorganization plan. Nonetheless, for the reasons which follow, the Court cannot order any of the reorganization plans as proposed.

The Supreme Court in *Milliken* mentioned some of the major problems in consolidating districts, including assessing taxes and setting of election periods. Those decisions are difficult, but in the main, standards exist either in state statutory materials or court decisions which could be used by the equity court to determine some of these issues, and whether proper discretion had been exercised by the state and local officials. The decisions we are asked to make here are much more difficult, and much more open to question with little guidance from state law or

103. *See* pp. 7-8, *supra.*

104. *Milliken*, 418 U. S. at 746.

105. *See, e.g.*, Tr. at 2948.

federal constitutional guarantees. The State Board and the suburban districts would have us determine, *e.g.*, where present districts should be cut, and what weight should be given to equalizing tax assessments, or populations. Although the State Board has presented a plan, during testimony it admitted that, in light of more recent figures, it would probably recommend somewhat different lines be drawn.[106] In view of the major differences in opinion with regard to the inclusion or exclusion of Newark, the issues of transportation time and population levels of appropriately sized districts ought to be dealt with explicitly by State education officials. Had the State Board's plan or any other plan been drawn with reference to specific criteria formulated after consideration of the task to be accomplished, and was therefore a reasonable method of accomplishing the goal by persons given such power in the state system, the Court could then view the matter as requiring only a determination of whether discretion was properly exercised in drawing the lines, etc. Absent such criteria, we feel that the more proper course is to create a situation which will not freeze the district lines by court order, but will create a framework within which the State can make a future determination of proper districts for the area, while insuring that actual desegregation will take place.

The State Board has claimed that its plan for reorganization does nothing but follow the method approved by the State Legislature in the Educational Advancement Act, and that therefore some weight should be given to it. First, as we noted above, the proposal varies from the statute in certain respects, and we cannot now determine by hindsight what weight was attached to those portions of the statute with which the proposal differs. The State Board's proposal splits at least one district, despite the bond problems which might be caused thereby. We do not know and canont now guess how the State Legis-

106. *See* Tr. at 1603-04.



lature would have desired to handle such a problem.[107] The State Board treats rather lightly the size limitation of reorganized districts imposed by the Legislature. It may well be that size is no longer the problem it was once thought to be,[108] but we have no evidence upon which we can say with finality that the State Legislature would treat it as such.

Similarly, to impose a county-wide system although it would offer significant advantages not only to DeLaWarr but also to the Court, would be to order a major shift in Delaware school policy. If such a shift were necessary to remedy a constitutional violation, it would be permissible, but as we find in our treatment of geographic area, *infra*, p. 53, no such showing has been made here.

Nonetheless, as we noted *supra*, some reorganization is required. The Court must at a minimum determine the districts which will be included in such a reorganization, and make provisions for the governance of the area in the event that the State officials fail to act. We note that our opinion in this regard is not a final determination of the organization of the area and of the lines to be followed in setting up such an area,

107. *But see also*, 14 Del. C. § 1028, which deals with the division of an existing district into two or more separate districts, and the resulting treatment of the indebtedness of the former district. Under that section, the indebtedness of the component district remained the obligation of the residents of the area of the former district, to be collected through taxation by the new districts whose boundaries included the former district lines. 14 Del. C. § 1028(d)(e).

We note, however, that the problem of bonded indebtedness becomes much different when a district is not simply divided, but divided and merged into still another district. This would require maintaining the identity for tax purposes of the former district's area, so that the residents of that area might be taxed for purposes unrelated to their present district, and to thus create several different tax structures within a new district dependent upon whether one lives in the former district area split off or the whole joint district, which would be not only administratively burdensome, but would also require some modifications in the present tax structure of the New Castle County districts.

108. *Cf.*, 393 F. Supp. at 444-45.

as would be the case if we were to order one of the reorganization plans proposed to us. Rather, the reorganization outlined *infra* is effective only in absence of proper state action to change it. Of course, if the state or local officials were to act in such a manner as to defeat or block desegregation under the guise of a shift in the reorganization plan, the Court would be forced to review the State's action in light of the requirements set out in *Wright* v. *Council of City of Emporia*, 407 U. S. 451 (1972); and *United States* v. *Scotland Neck Board of Education*, 407 U. S. 484 (1972).

In determining how such a reorganization would best be accomplished in light of our limited objectives, we have, whenever possible, attempted to comply with state law. It would seem clear that we are not bound by state law, for this is a matter of a federal remedy for a violation of federal rights. *See Louisiana* v. *United States*, 380 U. S. 145, 154-56 (1965); *Haney* v. *Board of Education of Sevier County*, 429 F. 2d 364, 368 (8th Cir. 1970). However, we read *Milliken* as requiring that the equity court in ordering desegregation remedies give proper deference to the traditions and acts of the states in setting up educational units. 418 U. S. at 741-42; *and see Gautreaux*, 44 U. S. L. W. at 4483-84. Such decisions are far better left to legislators and the process of compromise than to the rigors of judicial determination. 418 U. S. at 744. We have, therefore, followed state law in determining the extent of reorganization and the method by which districts will be included, except where those provisions would prevent a remedy from becoming effective. Determinations of methods of governance, and the day-to-day operations of the schools will be left in the hands of appropriate local officials. This Court should have no need to interfere in those decisions, unless they violate federal law or constitutional provisions. In any event, the initial determination will be by those who are by training, expertise and experience qualified to make such judgments. *See Milliken*, 418 U. S. 744.



VI. *Remedy.*

As we have made clear, reorganization or consolidation of some portion of the existing districts is required, since otherwise an inter-district plan would fail by reason of its administrative burden. While there are undoubtedly problems in the management of large school districts, the problems of curriculum coordination, planning, teacher and staff control and supervision, policy implementation, and coordination of school programs with the needs of the community can be better met by a district with sufficient power to meet the problems which will arise, rather than by having 11 or 12 different districts arrange separate solutions. Moreover, it will allow the parents of children attending the schools to have some voice and control over their child's education by the power to elect school board members.

In reviewing the evidence, it has become plain that the Court must choose between following the provision of state law which confined reorganized districts to enrollments of fewer than 12,000; and that provision which sought to limit reorganization to whole districts. The reasons for the first limitation were several fold, including a desire to maintain small units which would require a lower administrative overhead; and to continue the use of small locally elected school boards.[109] We have already found that there is substantial professional disagreement over whether the 12,000 population figure is necessary to achieve the administrative economies sought,[110] and the present testimony has reinforced that view.[111] Moreover, as we have already noted, even the State Board in its suggestions to us did not find the 12,000 figure a controlling limitation.[112]

Local community control is, of course, an important feature of American education, and we are required to give deference to

109. *See*, 393 F. Supp. at 444.
110. *Id.* at 445.
111. *See, e.g.*, Tr. at 1269-70.
112. *See* note 96, *supra.*

it unless circumstances dictate otherwise. *Milliken*, 418 U. S. at 741, and *see Gautreaux*, 44 U. S. L. W. at 4484-85. We find that circumstances here indicate that the required change in local control need not be so substantial as to give rise to major problems. The 12,000 pupil limitation would require us to split existing districts, and would for all practical purposes make any reasonable reorganization impossible. The change which we require *infra*, although initially setting up a large district, is not only subject to appropriate subdivision for local control over issues of policy in particular schools, or local initiative with regard to curriculum, *etc.*,[113] but is also subject to redivision into smaller governmental units by action of the State, so long as such subdivision does not result in the frustration of the desegregation objective. Even if the State should decline the opportunity, experience in other states has shown that districts of the size proposed *infra* can be effectively administered.[114]

The alternative in the instant case would be for the Court to attempt to redistribute the population and tax ratables of the area by drawing new district lines. Although such an operation is theoretically possible, and might be accomplished in reliance on the evidence presented by the State Board and other parties, we are unwilling to impose our view of the most reasonable distribution of tax base and population levels. Even if we were to assume, as the State Board evidently did, that Wilmington should be treated separately as the souce of the "problem" and that no other district lines need be shifted,[115] we would be

113. *See* Tr. 1837-38, 1901.

114. We note that some school districts in Florida presently operate with an even larger number of students; in one instance, almost triple that here. (Dade County in 1973-74 had 259,949 pupils). The Court also heard testimony from Charles Wendorf, presently an administrator with the Prince George's County School System in Maryland, *see* Tr. at 1807, *et seq.*, which serves some 148,000 students. Tr. at 1810-11.

115. *See* Tr. at 170, 253, 254-55, 260, 265. We do not treat the issue of whether the determination that only Wilmington would be split might be an improper classification. Such a plan was proposed at the time of the 1968 Act. *See, e.g.*, Tr. 2551-52.



required to determine which alternative presented by the parties was the "fairest" way to split that district. For the Court to become involved in such a ask in the first instance, would be to raise many of the problems which the Supreme Court in *Milliken* found to be unsuited for judicial determination. 418 U. S. at 743-44. *And see San Antonio School District* v. *Rodriguez*, 411 U. S. 1, 41 (1973). The problem of splitting the liability on bonds and other outstanding obligations also raises difficult questions of how much of a tax "break" to allow to some of the districts,[116] and an examination of the Educational Advancement Act makes clear that the problem is not one previously determined by the State Legislature.[117] For these reasons, the proper course for this Court is to consolidate whole districts, subject to the power of the Legislature to redivide the areas in the future, using appropriate lines which are non-racial in their purpose and effect.[118]

### A. Extent of Area.

Having determined that only whole districts are to be included in the plan; that the 12,000 pupil limitation on enrollments does not apply; and that this Court is not the proper agency to subdivide the area into new districts, we turn to the question of which districts must be included in the remedy to be ordered. It is apparent, of course, that this will affect the question of what will constitute a prima facie desegregated school, and will affect the administrative and other operational burdens.

This determination is primarily a question of whether two outlying districts, Appoquinimink and Newark are to be included within the scope of the plan. The decision as to Appo-

116. Tr. 1563-69; 1667-69; D. DPI. Rem. No. 22.

117. *Compare* 12 Del. C. § 1006 *and* § 1028.

118. *See* Wright v. Council of City of Emporia, 407 U. S. 451 (1972); United States v. Scotland Neck Board of Education, 407 U. S. 484 (1972); Keyes v. Denver School District No. 1, 413 U. S. 189 (1973).

quinimink is relatively easy. Only DeLaWarr's plan sought to include Appoquinimink, and then only for the sake of logical consistency in urging a "County-Wide" plan, since Appoquinimink would be treated as a separate "attendance area".[119] Another district partially within the county was excluded since it has no school buildings in the area.[120] As *Milliken* emphasized, the task before the Court is to remedy the violation found. 418 U. S. at 738. The Court cannot conclude on the present evidence that Appoquinimink would in any way have properly been part of the exercise of discretion of the State Board in eliminating the dual schools at the time of the Educational Advancement Act.[121] The district was created by the reorganization, as a combination of the former Odessa and Middletown districts.[122] Moreover, the district is apparently operating a unitary system which is approximately 70% white.[123] Its schools are located in the approximate center of the district, a substantially greater distance from the major black population centers in Wilmington and DeLaWarr than any other district. Since its inclusion would in any event be of very little impact on the existence of predominantly white or black schools in other areas of the county, we have determined that Appoquinimink need not be included.

Newark School District has also urged that it is too far distant from Wilmington to make its inclusion proper, saying *inter alia*, that transportation time would increase greatly.[124]

119. *See* D. DeLaWarr Rem. No. 2 at 160, and No. 3.

120. This is the Smyrna District, which is south of Appoquinimink, and whose boundaries cross from New Castle County into Kent County. *See* D. DeLaWarr Rem. No. 3; Tr. 1933-34.

121. *See generally*, 393 F. Supp. at 445.

122. See PX-23-0 (liability phase), at frontpiece.

123. See D. DPI. Rem. No. 24 at 1. The enrollment of the district as a whole is 72.2% white, and the schools range from 69.0% white to 76.3% white, an insignificant variation in light of the fact that the variation is centered in the elementary schools which range from 70.2% to 75.6% white, which even in the school with the greatest elementary enrollment would amount to an actual difference of 35 pupils in an enrollment of 658.

124. *See* Tr. at 131, 1090; D. New. Rem. No. 4.



*See, Swann*, 402 U. S. at 30-31. It has also urged that Mount Pleasant and Conrad seek to include it for an impermissible reason, *viz*, the prevention of white flight to Newark following the desegregation of other schools in the area.[125]

The mere existence of racial disparity in the enrollments of neighboring districts is not a constitutional violation;[126] and thus the existence of such a disparity is no grounds for ordering a remedy. It is clear from other cases, however, that the potential of white flight may be included in the exercise of the Court's informed discretion on what would constitute an appropriate remedy.[127] We have already determined that constitutional violation existed at the State level, and moreover, we have said that the effects of the pre-*Brown* segregation to which Newark was a party have not yet been dissipated.[128]

Based on the evidence presented to us, we think it clear that Newark is not so far from some portions of Wilmington that a workable desegregatory school attendance plan could not be implemented. In fact, transportation times even on the longest and most unlikely routes were not so significantly long as to endanger health or welfare of students.[129] *See, Swann*, 402 U. S. at 30-31. The witnesses from Newark agreed that the present bus route times were not dispositive because the routes would have to be redesigned in light of whatever new assignments

125. *See, e.g.*, Tr. at 890. In general, if Newark were excluded, its schools would remain more than 90% white (they are presently 94.2% white), while most of the schools in the other districts would have substantially greater black enrollments. See D. DPI. Rem. No. 18; D. Mt. Pl. Rem. No. 7.

126. *See, Milliken*, 418 U. S. at 756 (Stewart, J. concurring).

127. *See*, Wright v. Council of City of Emporia; *supra*, 407 U. S. at 465; United States v. Scotland Neck Board of Education, 407 U. S. at 490-91.

128. *See* 393 F. Supp. at 433 and n. 7.

129. *See* Tr. at 1123, 1130-31; *see also*, Tr. at 1064-83. It should also be noted that at present, vocational education students from Newark are bused out of the district and into Wilmington. Tr. at 283.

were made,[130] and that such assignments would most likely be made to include only those schools which were geographically near.[131]

It is difficult to say with any certainty that Newark would have been included in any reorganization had the State Board been entitled to exercise its discretion in 1968. Since Newark at that time had close to 12,000 students, the effect of the enrollment limitation may have been to foreclose Newark's inclusion.[132] On the other hand, had the Legislature or the State Board considered desegregation as one of the appropriate goals to be accomplished in the course of reorganization,[133] very different criteria might have led to the consolidation of part of either Wilmington or DeLaWarr with part of the present Newark district. We do not, however, rest out holding on such post hoc rationalizations, and on what might have been. Rather, uncontradicted testimony indicates that the stability of any desegregation plan is enhanced by the inclusion of larger geographical areas and higher white populations.[134] The Court cannot ignore the fact brought so forefully to its attention that desegregation is costly, in ways beyond dollars spent on additional equipment and training. The difficulties of declining tax bases, and the problem of preventing growth areas from maintaining the duality of schools in the Northern New Castle County area require the inclusion of Newark.

We note for the sake of clarity that the inclusion of Newark in the area to be desegregated does not *ipso facto* require the transportation of students from schools in the far western or southern fringe of the present district to schools in eastern Wilmington and vice versa. Newark shares this problem of distance with the New Castle-Gunning Bedford and parts of Alexis I. DuPont Districts, and shares as well the position of having some of its schools easily accessible to desegregation plans. The issue in assignment of students will be whether the assigning agency in the future meets its burden of showing that the existence of one race schools is not due to the maintenance of a dual system.[135]

130. Tr. at 1138-39.

131. *Id.* Moreover, Newark found unobjectionable the time required to transport black children to Newark, focusing its objection instead on the time required to transport white children into Wilmington. Tr. 1235, 1240.

132. *See* 393 F. Supp. at 444.

133. *Id.* at 445.

134. *See, e.g.*, Tr. at 890, 899, 983, 1007-08.



For reasons substantially similar, it is apparent that the remaining districts in Northern New Castle County not specifically addressed, *supra*, must also be included to remedy the inter-district violations found in the last opinion. We will not repeat that analysis, but say simply that the desegregation area which is required to remedy the effects of violations found in the instant case is that area presently comprised of the suburban districts of New Castle County north of the northern line of the Appoquinimink School District; and the District of Wilmington.

B. Numbers.

As we have noted the school age population of the Northern New Castle County area is 80,678, of whom 78.5% are white.[136] In the plans submitted to this Court, all the defendants based their enrollment projections on the assumption that every school in the desegregation area would be required to approximate those percentages in their enrollments.[137] In addition, one attack leveled at the plan proposed by the Wilmington School Board was that it left some schools "perilously" close to enrollment figures which would favor so-called white flight.[138]

Ordinarily, racial enrollments of each school would not be a question to be addressed initially by this Court. As the Supreme

135. *Swann*, 402 U. S. at 26.

136. *See*, pp. 5-6, *supra*.

137. *See, e.g.*, D. DPI. Rem. No. 8; D. DPI. Rem. No. 18; D. Mt. Pl. Rem. No. 2.

138. *See, e.g.*, Tr. at 887-88.

Court said in *Swann*, assignment of students is first and foremost a function to be performed by local officials in light of local conditions. We do not propose the imposition of definitive racial quotas for particular schools. *Swann*, 402 U. S. at 24, 26.[139] What we set forth here is not a determination of a "quota". Rather, it is a statement of what will be considered a desegregated school upon any necessary review of actual assignments made by local officials.[140]

The question to be considered, therefore, is what constitutes a prima facie "one race" school within the context of the desegregation area. A "one race" school for these purposes will be defined as a school whose racial enrollment figures indicate that its population is substantially disparate from the expected range of enrollments in a genuinely nondiscriminatory system, allowing for a variation in pupil assignments.[141] The starting point of any such analysis must be the actual school population figures for each grade of the school system as a whole.[142] To that figure must be added a variational range, which is reflective of the informed judgment of the Court on how actual enrollments will affect the perception of the community on whether the school is

139. "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate the schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." 402 U. S. at 24.

140. That is, the function of racial enrollment figures is to serve as a signal to both the assigning officials and the Court on review of their actions, of whether the system has in fact been desegregated or remains dual. *Milliken*, 418 U. S. at 741, n. 19; *Swann*, 402 U. S. at 26.

141. A range of variations is required, simply because students do not come neatly packaged in groups of 30 per grade with perfect racial balances. *See* Tr. at 908. There are also variations in the racial enrollments between school levels, *e.g.*, there are more black students in elementary schools than in high schools. *See* Tr. 2572.

142. *See, Swann*, 402 U. S. at 24-26.



in fact desegregated, or is predominantly of one race;[143] and the psychological impact of the number of students upon the members of the minority.[144]

The figure of approximately 15% variation on either side of the actual minority schoolage population has been mentioned to the Court as the "usual figure".[145] Here, however, that figure would produce the substantial possibility of minority enrollments of under 10% in predominantly white schools. The testimony to the Court has been uncontradicted that such a figure presents severe difficulties in the "identity" of minority youngsters, who would not see fellow minority students in positions of leadership in the school.[146] Moreover, the 15% variation would allow enrollments in schools at the higher end of the range to approach 40% black enrollment, a figure which is said to produce a substantial likelihood of white flight.[147] Taking into consideration all of the factors in the present case, including those already described, the geographical proximity of the area and the transportation network available, the Court will consider that any school whose enrollments in each grade range between 10 and 35% black to be a *prima facie* desegregated.[148] We emphasize, however, that the assignments made by the local authority must remedy the existence of dual schools and must otherwise be designed to achieve the greatest possible degree of actual desegregation.[149] School officials making the assignments may, if they

143. *See* Tr. 898-900, 992-93.

144. *See* Tr. at 904, 905-06; 2350-02; 2417-18; 2426.

145. *See* Tr. 2571, *et seq.*

146. *See* citations, note 144, *supra.*

147. *See* Tr. at 887, 905, 983.

148. Some schools on the far edges of the county may necessarily remain all or predominantly of one race because of transportation problems or other practical difficulties. In those instances, the assigning authority will bear the burden of showing that assignments were genuinely nondiscriminatory. *See, Swann*, 402 U. S. at 26.

149. *Swann*, 402 U. S. at 26.

choose, follow a much stricter percentage range whether for reasons of preventing white flight, or otherwise.[150]

C. Governance.

In ordering reorganization or consolidation of existing districts, we must define who will be charged with the operation of the system on a day-to-day basis. We repeat that the State Legislature and the State Board of Education may take such steps as are not violative of constitutional rights to change the pattern set here. Although the following governance devices should thus be regarded as interim pending such action by the State, they will necessarily remain operative for so long as the State takes no action.

The governance of the reorganized desegregation area shall be by a board whose membership will initially be composed of certain representatives from existing boards. Delaware State law presently provides that a school board be composed of five members, except vocational-technical school boards which are made up of seven members.[151] A board of this size is small enough to

150. The record before the Court indicates that racial enrollments within a small range are possible if school officials so determine. Tr. 2526.

Our Brother Layton's concurring and dissenting opinion seemingly advocates the adoption of a variation of the Wilmington Metro Plan, our objections to which are discussed in another section of our opinion.

For the sake of clarity, we emphasize that the racial characteristics of the population of the area as a whole are the necessary starting point in determining whether a school is disproportionately of one race. *See Swann*, 402 U. S. at 26. Our figures of not less than 10% nor more than 35% black, which signal the prima facie achievement of a desegregated school, are not arbitrary figures, but are drawn from the record as described, *supra*, pp. 60-62. Whether the result is commensurate with the constitutional standard established in *Swann*, 402 U. S. at 26, must await the actual assignments by the proper authorities to achieve "the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." Davis v. Mobile County School Comm'rs., 402 U. S. at 37.

151. 14 Del. C. §§ 1052, 1064.



work closely together and to be called together quickly to deal with policy matters. To provide the same per capita level of representation to all constituents as at present would, in an area the size of the desegregation area, require a much larger board.[152] Moreover, the Court would have to be concerned with the division of that number among the districts, either on a geographical basis or a population basis.[153]

The interim board will therefore be appointed in accordance with the system used in the reorganizations under the Educational Advancement Act. That is, the new board will consist of five members appointed by the State Board of Education from among the existing boards of the component districts.[154] The discretion of the State Board will be controlled to provide some geographical range and population equality only to the extent that one member of the interim board shall be appointed from the present Wilmington Board; one from the Newark Board; one from either the New Castle-Gunning Bedford, DeLaWarr or Conrad Boards; one from Stanton, Marshallton-McKean or Alexis I. DuPont; and one from Alfred I. DuPont, Mount Pleasant or Claymont.

We are aware, of course, that this method will leave some existing boards without a representative on the interim board. Given the choice, however, between devising our own method of selection or election, and following as nearly as possible the present State law, we have chosen to follow State law, which we

152. Assuming that the reorganized districts were to have a peak enrollment of 12,000 students and be controlled by a five person board, there would be a ratio of board members to students of 1 to 2400. To achieve that same ratio where 80,678 students are involved would require a board of 33 members.

153. The component districts range in enrollment from Newark which has 20.9% of the total enrollment of the desegregation area, to DeLaWarr which has 3.9%; Wilmington has 17.1%; Alexis I. DuPont has 4.03%; Alfred I. DuPont has 12.7%; Claymont has 4.09%; Conrad has 6.61%; Marshallton-McKean has 4.6%; Mount Pleasant has 6.03%; New Castle-Gunning Bedford has 11.1%; and Stanton has 6.61%. Figures derived from D. DPI. Rem. No. 24.

154. *See* 14 Del. C. § 1065.

deem reasonable under the circumstances. There do not appear to be any potential conflicts of interest among the suburban districts which would require their individual representation. Any potential problems which do arise may be minimized by allowing extensive advisory opportunities for the existing district boards, during an interim period, or by seeking to have the State Board and the State Legislature change the existing mode specified by statute.

The interim board so appointed will be responsible for the operation of the school system in accordance with 14 Del. C. §§ 1041, *et seq.*, until such time as the State may adopt changes. Included in these responsibilities will be the initial assignment of students for the purposes of desegregation; and the levying of necessary taxes, *etc.*, as well as the hiring of faculty and the choice of curriculum.[155]

For reasons discussed *infra*, this Court will stay the operation of certain phases of this Opinion until time for final review has passed. The present school boards will continue to maintain their responsibilities during the stay. Nonetheless, the State Board should immediately undertake to appoint the new board, so that that group may begin its planning and other necessary operations. The interim board shall be required to make initial assignments for the fall of 1977, subject to the supervision and control of the State Board of Education, which bears the final responsibility for compliance with the orders of this Court. We assume the State Board will act with sufficient speed to allow the planning and assignment to be made within a time frame which will allow review by the State Board.

Under the provisions of state law, the old boards of the component districts will be dissolved upon the interim board's assuming full responsibility in accordance with this Opinion.

155. The powers of this Board will, of course, be circumscribed by the general powers of the State Board under 14 Del. C. §§ 121, 122; and the decisions of the new board would be in accordance with the regulations which the State Board is empowered to make.



The appointed members of the new board will serve in their capacity as members until elections for new members can be held in the reorganized districts in accordance with existing state law[156] or in new election districts designed by appropriate State authority.

### VII. *Other Issues of Consolidation.*

Also before the Court are several categories of issues which relate principally to the operations of the consolidated district. For convenience, these issues are treated here seriatim.

#### A. *Faculty.*

Most of the plans submitted to the Court included provisions for the implementation of an "affirmative action plan" with regard to the hiring and assignment of faculty in a desegregated fashion. The Court is cognizant of the difficulties which may be involved in switching from a system of separate districts, and the potential for abuse which is present.[157] We are also cognizant that as a matter of law, racially identifiable faculties are one signal of a racially identifiable school, and the Court, in examining the results of any plan, must necessarily be aware of those figures.[158] Several difficulties arise in the present case, however. We have no figures in the record to indicate whether there is a substantial disparity in racial makeup of existing staffs. We have no evidence of violations by the present boards, except some hint that there are presently actions by the Equal Employment Opportunity Commission pending in this regard.[159] Under these circumstances, we have no record upon which to determine the scope of any alleged violation, and no basis upon which to order an affirmative action plan.

156. *See* 14 Del. C. §§ 1051, 1052.

157. *See* Tr. 941, 2354-57, 2405-07, 2518-21, 2825-27.

158. *See generally*, Keyes v. Denver School District No. 1, 413 U. S. at 202; and *cf. id.* at 206.

159. See Tr. at 2359.

The second major issue with regard to faculty relates to the decision of whether to require "leveling up" of staff salary and benefits as part of the reorganization. This issue arises because at present the teachers and staff throughout the districts have separate bargaining agents and have separate contracts with each of the districts.[160] The issue of "leveling up" arises with particular force because the initial annual cost of doing so has been variously estimated as an additional 14 to 16 million dollars or more.[161]

Testimony before the Court indicated that as a matter of preference in educational circles, "leveling up" is beneficial, since it eases labor strife. In fact, as part of the reorganization of the schools under the Educational Advancement Act, "leveling up" was required.[162] Briefs of certain of the parties have urged that we consider leveling up; and the State teachers' organization, the Delaware State Education Association, as an amicus, has taken the position that such leveling up is required in order to prevent disruption in the schools as part of the desegregation process.

We decline to order leveling up, for several reasons. First, as we have made clear, we do not by this Opinion intend to "freeze" the organization of schools within the area. We therefore cannot be sure, especially since there was no testimony before us upon which we could even estimate the nature of the differences, to what level salaries in differing combinations of districts might have to rise. Moreover, the issue is directly related to local policies and practices with regard to education and employer-employee relations. If any contractual changes are required, the new board appointed pursuant to this decision

160. The faculty and staff salaries are funded in part by the State which establishes a "floor". Local districts may then supplement this amount with local funds according to agreements made with local teacher representatives. See 14 Del. C. § 1711.

161. Tr. 2247; Int. Plaintiffs' Exh. Rem. Nos. 9, 10; D. New Rem. No. 10.

162. 14 Del. C. § 1009.



or its successor or successors ought to make such a determination. Any decision affecting tax rates and day-to-day operations which is not necessary for the actual desegregation of the schools, is better left in the first instance to the local decision makers. *See Milliken*, 418 U. S. at 743-44.

B. Hispanic Students.

The Court allowed representatives of the Hispanic population in the area to intervene to protect the existence of certain bilingual programs and to insure that the success of those programs would not be endangered by any plan which the Court might order.

Our allowance of the intervention and our comments here are designed only to protect the program as it now exists. We make no determination on the present adequacy of compliance with the requirements of 20 U. S. C. §§ 880b, *et seq.* Nor do we here find that the members of the Hispanic population have otherwise been victims of any discriminatory action on the part of any school district which is a part of this litigation.[163]

With regard to those students already identified as requiring bilingual education, or who are otherwise taking part in such education now, the interim board or such other board or boards as may be appointed by the operation of state law, shall in the course of implementing this decision insure that those students will be placed in schools in sufficient numbers to allow the program to continue; and shall insure that the program will not be reduced or cut back as to those students presently receiving it. In all other respects, we assume that the new district or districts will comply with the requirements of federal law in this regard, including those statutes or regulations of HEW which may require the identification of other students needing such assistance and the provision of the programs made neces-

163. *Cf.*, Keyes v. Denver School District No. 1, 413 U. S. 197 (1973).

sary thereby.[164] We also note that in enrollment statistics as provided by the State, Hispanic students are listed as a minority population,[165] and we assume that the new board or boards will so categorize them for purposes of determining whether a school is racially identifiable.[166]

C. Exceptions to General Assignments.

For reasons of equity and practicality, the Court will exempt from any requirement of inclusion in desegregation plans certain students and types of students as follows:

First, there are several schools operating in the New Castle County area which serve various special students, *e.g.*, those who are orthopedically handicapped,[167] audially handicapped,[168] or otherwise eligible for special programs.[169] These schools are subject to the day-to-day control of the district in which they are located, and we have no evidence that they presently operate on other than a nonracial basis. We see no reason to change the operation of these schools or the special requirements which they might have with regard to qualification for entrance. The interim board and its successors may continue their operation in their present locations.

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164. *See, e.g.*, 20 U. S. C. §§ 1703(f); 1921(b)(12); 20 U. S. C. § 800b *et seq.*; and Lau v. Nichols, 414 U. S. 563 (1974).

165. *See, e.g.*, D. DPI. Rem. No. 24.

166. We have heard no testimony on the question of whether Hispanic students would constitute a minority in Delaware for Fourteenth Amendment purposes, and we do not determine that the State Board or the local board or boards would be constitutionally required to treat the Hispanics as a minority group. The issue before the Court on the intervention was solely the protection of existing programs, and our Opinion is limited strictly to that question.

*See generally*, Keyes v. Denver School District No. 1, 413 U. S. at 197.

167. Leach School in DeLaWarr District, which draws from the county as a whole.

168. Sterck School draws from the whole State.

169. D. DeLaWarr Rem. No. 3 shows six special schools altogether.



Second, for reasons of practicality, the Court will not require two groups of students to bear the burden of any transfers from present schools which may result from this Opinion. Seniors in the year in which the plan goes into effect would suffer only if it became necessary to transfer their files from their present schools at a time when they are most in need of advice, letters of recommendation, and so on, in applying for further education or jobs. Moreover, they have developed strong attachments and loyalties to their present school, and will most likely be serving in positions of leadership in student organizations, whose continuation adds much to the community life of the school. Therefore, rising seniors will not be required to be reassigned.

For other reasons, the Court will not require the reassignment of kindergarten children. The program presently available in Delaware is for a half-day. The Court is aware of the difficulty in gettting children of that age to and from school on a half-day basis, without requiring additional time for transportation. A half-day program is not so significant a part of the educational process as to demand it be made a part of any reassignment of children. Of course, any kindergarten desegregation which can be accomplished by means short of transportation to schools other than those closest to the child's home offering his level of program may and ought to be considered by the assigning agency.

Lastly, as to those children who are to be included in the desegregation plan itself, the Court will not at this time require any particular method. Several listings of the order of alternatives to be used are available. *See, e.g.*, 20 U. S. C. § 1713; *and* Tr. at 2492-96, 2504-06. In making their plans, the new board or its successors should make such changes in attendance boundaries, or other methods as will insure the desegregation of the schools as we have already defined it.

In order to assist in the orderly transformation to a unitary system, and to prevent any requirement of a burdensome

expenditure of funds in the first year of operation, the Court will allow the plan to become effective over a two-year period. The initial desegregatory assignments, especially in the high schools and intermediate schools, must be made for the fall 1977 term. Full compliance with constitutional requirements on all grade levels must be completed with the school year commencing in September 1978.

In achieving this goal, the Court will not prevent the utilization of any voluntary method of desegregation, so long as the schools are actually desegregated in accordance with the timetable set forth. Thus, if the new board were to try magnet schools to desegregate the upper elementary grades during the first year of operation, the Court will follow the attempt with great interest. Regardless of the success of that endeavor, however, the Court will require the plan to achieve actual effective desegregation for all affected grades by the second year of operation, by whatever methods should reasonably become necessary.

D. Vocational Technical Schools.

The Court was urged by the Intervening Defendant, New Castle County Vocational Technical Board of Education ("VoTech Board") to address the operation of vocational-technical schools in the desegregation area. At present, the operation of the schools in the area is not uniform. One school is operated by the VoTech Board, which taxes county-wide to support it. Two other schools are funded separately by the districts in which they are located, Wilmington and Newark.[170] The Court considers the mode by which such education is delivered to the students and the supervising body of such schools to be a matter left to the discretion of state authorities. Absent a showing that the present method offends constitutional guarantees, the Court has no power to interfere. *Cf., Milliken,*

170. In actuality, the VoTech school located in the Newark area is not yet in operation. This school, the so-called Hodgson Career Center, will open in the fall of 1976.



418 U. S. at 744-45. Those schools presently operated by districts to be merged into the reorganized district will become the responsibility of the new board or its successor. The Del-Castle Center will continue its operation as at present, subject to any change to be made by the State, or its agencies.

VIII. Effect of 20 U. S. C. §§ 1701, *et seq.*

The Court requested briefing on the effect of certain amendments to the Equal Educational Opportunity Act passed by Congress in 1974.[171] After consideration of the issues raised by the briefs, and an examination of the terms of the Act and the legislative history, it is our view that we have complied fully with the statutory requirements applicable here.

We note first that Congress explicitly stated that it did not intend to modify or diminish the powers of the courts to enforce fully the Fourteenth Amendment to the Constitution.[172] This section was based on a Senate provision included as a declaration of policy by the Conference Committee.[173] Moreover, the courts

171. Act of August 21, 1974, 88 Stat. 514, 20 U. S. C. §§ 1701, *et seq.*

172. *See* 20 U. S. C. § 1702(b).

173. *See* Sen. Conference Rep. 93-1026, *reprinted in* 1974 U. S. Code Cong. & Admin. News, Vol. 3, 4206 at 4219. The effect of this section was critical in the debate over passage of the Act. As originally drawn by Rep. Esch of Michigan, the amendments had no such proviso. *See* 129 Cong. Rec. H. 2158 (March 26, 1974). [All Cong. Rec. citations are to the daily edition.] Following attempts at substitution of other provisions, 129 Cong. Rec. H. 2166 (remarks of Mr. Anderson, March 26, 1974), the House passed the Esch bill as an amendment to the Education Act. 129 Cong. Rec. H. 2177.

The Senate refused to agree to the Esch bill, however, and passed differing legislation, which included the separate provision (the so-called Scott-Mansfield amendment) that the terms of the bill were not in any way to affect the power of the courts to deal with violations of constitutional rights. For a comparison of the provisions of each chamber, *see* 129 Cong. Rec. H. 7209 (remarks of Mr. Quie, July 25, 1974). The Senate rejected the Esch bill only narrowly, but the Senate Conference Committee refused to agree

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which have considered the matter have held that the law should not be read as diminishing the power of the courts to deal with violations which have been found. *See Brinkman* v. *Gilligan*, 518 F. 2d 853 (6th Cir. 1975), *cert. denied*, 44 U. S. L. W. 3331 (1975).[174]

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to any bill which did not include that disputed language. The House was similarly incalcitrant and instructed its Committee several times to stand by its original language. *See, e.g.*, 129 Cong. Rec. H. 5844-45 (June 27, 1974); 129 Cong. Rec. H. 6815 (July 22, 1974).

Finally, because the bill provided funding for certain other educational programs and was greatly desired, the Conference Committee agreed to the inclusion of the Senate language as a part of the Congressional policy statement. *See* Senate Conference Report, *supra*. The supporters of the original legislation in the House responded with accusations of betrayal, and the statements that the results of the amendment was the effective "gutting" of the provisions of the bill dealing with remedy. *See, e.g.*, 129 Cong. Rec. H. 7402 (remarks of Mr. Esch, July 31, 1974); H. 7406 (remarks of Mr. Landgrebe, July 31, 1974); H. 7410 (remarks of Mr. Parris, July 31, 1974); H. 7414 (Mr. Bauman, July 31, 1974).

The members of the Conference Committee from the House responded by saying that the effect of the provision was only to insure that the courts would have the opportunity to review the legislation for constitutionality, *see* 129 Cong. Rec. H. 7413 (remarks of Mr. Lehman, July 31, 1974), an understanding which flies in the face of the language itself and the powers of the federal courts since *Marbury* v. *Madison*, 5 U. S. (1 Cranch) 137 (1803). Although generally the remarks of those who oppose the passage of legislation are not convincing as to its purpose and meaning, because of their zeal to defeat it, *see* Ernst & Ernst v. Hockfelder, ..... U. S. ....., 44 U. L. W. 4451, 4457 n. 24 (U. S. March 30, 1976); here such remarks are useful to show that the language was seen as changing the original House bill to something quite different from the intent of the framers of the original legislation. This is particularly true when the Senate Committee members in their remarks to their own house made the same point in support of the amendment as accomplishing what the Senate had desired. *See, e.g.*, 129 Cong. Rec. S. 13382 (remarks Senator Javits, July 24, 1974).

Our understanding of the effect of that provision is therefore the most logical reading of both the language on its face, and its intent by the framers.

174. *Cf., Swann, supra*, 402 U. S. at 17, *construing* 42 U. S. C. § 2000c.



Any findings required by § 1715 have been set forth *supra* as part of Section V(C) of this Opinion.[175] The requirements of §§ 1715 and 1756, that district lines cannot be altered absent certain showings related to purpose and effect of segregation have been met in the prior opinions of this Court. It is true that in the last opinion we refused to hold that the Educational Advancement Act was passed for racially discriminatory purposes.[176] There was no need in that opinion to so hold, nor do we find such a need here. Construing the language of the statute requires us to read "purpose" in light of the prior holdings of the Supreme Court with regard to the Fourteenth Amendment. In particular, "purpose" must be construed in light of the holding in *Milliken*, the language of which is similar. We note that the original legislation, available as early as March, 1974, was introduced in specific response to the District Court order in *Milliken*. 129 Cong. Rec. H. 2160. We have found that the lines drawn in the instant case were drawn with the effect of precluding Wilmington; and that such a decision was made *knowing the effect*. The decisions of the Supreme Court are clear that knowingly to make a suspect classification is sufficient to create a Fourteenth Amendment violation. "Dominant purpose" of the legislators is not and never has been the key to such holdings. *See Wright* v. *Council of City of Emporia*, 407 U. S. at 461-62. To read the statute otherwise would require us to vitiate the language found in § 1702(b). We refuse to do so.[177] We also note that § 1756 specifically refers to actions within the school districts which have segregatory effects. Such actions have previously been described in our opinions.[178]

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175. 20 U. S. C. §§ 1715 and 1756 deal with the preservation of existing district lines, absent particular findings.

176. 393 F. Supp. at 439.

177. *See generally*, Vorchheimer v. School Dist. of Philadelphia, ..... F. 2d ....., No. 75-2005 (3rd Cir., March 16, 1976), at 11.

178. We note that this reading of the meaning of purpose is in accordance with the views expressed by the Senate Conference Committee who were the drafters of the language. "In this case what

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The 1974 amendments also include a provision requiring the stay of any order until the time for final appeal has run. *See* 20 U. S. C. § 1752; *cf., id.*, § 1757. Those provisions are not controlling here, since this opinion deals with a remedy for *de jure* and not *de facto* segregation. *See Morgan* v. *Kerrigan*, 523 F. 2d 917, 920 (1st Cir. 1975), *pet. for cert. filed*, 44 U. S. L. W. 3614 (U. S. April 27, 1976) (No. 75-1445), and cases cited therein. Nonetheless, we feel that a stay is appropriate here in some respects.

First, we acknowledge the Congressional policy expressed. Moreover, it is clearly within the discretion of the Court to approve a stay where the factual situation warrants it. *See Scripps-Howard Radio, Inc.* v. *FCC*, 316 U. S. 4, 9-10 (1942); All Writs Act, 28 U. S. C. § 1651. Here, the rights of the parties demand that certain aspects of the Opinion be carried out immediately, while portions be stayed. Thus, the State Board will be required to name the members of the Interim Board, and that group will be required to begin its planning and preparation immediately. Taxation of residents; liability to bondholders; contracts with teachers and staff; and title to property in the event of changes in the pattern of reorganization are properly issues of concern to the interim board. To avoid disruption in the administration of the schools for the upcoming year, actual vesting of full responsibility in the new board for the

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[the bill] basically provides—and I do not agree with this because I think busing is a necessary tool, it should not have too many restrictions on it—is that no youngster may be bused beyond the second nearest school to him unless it is in accordance with the Fifth and Fourteenth Amendments to the Constitution of the United States." 129 Cong. Rec. S. 13349 (Senator Pell, July 24, 1974). Similarly, Senator Javits in support of the Conference Committee report spoke of the provision as requiring only an "affirmative showing" of a violation of the constitutional rights of individuals. 129 Cong. Rec. S. 13382 (Senator Javits, July 24, 1974).

The bill was addressed, it should be noted, to transportation plans, not consolidation plans. *See* 129 Cong. Rec. H. 2160 (Mr. Esch, March 26, 1974), and remarks of Senator Pell, *supra*. Nonetheless, the Senate language is helpful as it also speaks to "purpose".



day-to-day operation of the schools will be delayed until September 1977.

The State Board shall set a day certain prior to September 1, 1977, when full responsibility will be transferred to the new board. Prior to such transfer, any expenses incurred by the new board shall be the responsibility of the component districts and the State Board. The State Board is also directed to select a name for the reorganized district or its successors, in the event the new board is unable to agree on such a name.

During the period prior to September 1977, and the transfer of full responsibility to the new board, the existing component boards may, of course, cooperate in attempting to implement magnet or other proposals which might achieve some level of desegregation.

## IX. *Miscellaneous Other Issues.*

The Court was asked to rule on certain other matters which relate principally to the ongoing operation of the new districts which might be formed, and of other areas of state law. The present record does not allow us to rule on these motions, and any decision with regard to them must be left for further actions to be initiated by complaining parties in light of further developments.

The first issue relates to the imposition by the Court of limits on further growth of certain schools which it is urged will still be operated as predominantly white schools. This was suggested to the Court as a means of restricting the scope of any actual transfer of students, while preventing the continuation or expansion of a dual system. The present record and the plan ordered by the Court herein do not now require us to make such an order. We must assume that the local authorities charged with the implementation of the plan will do so in good faith, and will follow existing law with regard to the construction of new facilities.[179] If they do not, we are certain that interested parents will

179. *See, e.g., Swann*, 402 U. S. at 20-21; Keyes v. Denver School District No. 1, 413 U. S. at 201-02.

insure that a proper remedy is pursued. Until an assignment plan is drawn by the new board and approved by the State Board, we have no way of knowing how many, if any, schools will be identifiably one-race majority schools, nor where those schools would be located. As part of its burden in justifying the existence of those schools, the local authorities should include whatever safeguards they feel are needed to prevent maintenance or creation of dual schools.[180]

B. Private Transportation.

In the prior opinion, we found that the subsidy provided by the State to cover the transportation of students to private schools had some effect on maintaining the racial disparity between the Wilmington and suburban school populations.[181] The plaintiffs have continued to press this point to the Court as a ground for relief against the State. The Court understands that the subsidy presently costs the State upwards of 700,000 dollars per year,[182] which the plaintiffs urge could be used for other purposes. We are urged on the basis of its racial effects to declare the statute unconstitutional, and enjoin its operation.

We refuse to so hold. Our previous finding indicated only that the effect of the statute was to assist in maintaining racial disparity. We assume for present purposes that the remedy which we have ordered is complete, and will end the existence of a dual system. Any injunction against the continuation of the State's policy of providing this subsidy must await a showing of its effects under the operation of the remedial plan here ordered. Other possible grounds of unconstitutionality were not raised by the parties, and are not ruled upon. Plaintiffs' motion for an injunction to prevent payment by the State of any subsidy for transportation to private schools is hereby denied.

180. *See, Swann* at 20-21; Tr. at 2511-12.

181. *See* 393 F. Supp. at 436-37; 14 Del. C. § 2905.

182. *See* 393 F. Supp. at 436, and *cf.*, Tr. at 1493.



C. Monitoring the Remedy.

Lastly, we have been urged to appoint a monitoring commission, to oversee the development and implementation of the plan.[183] On the present record, we see no need for such a commission to be invested with power by the Court. The existing committees have derived their power from the concern of State or local officials and groups. To add the power of the Court to these groups would raise disturbing issues of how to support and supervise such an ad hoc "master".[184] The parties before the Court include school districts, with their associated expertise and staffs, which will continue in existence up to the actual implementation and beyond; and the State Board of Education with its statutory supervisory and appeal powers.[185] The Court also takes judicial notice that in the past the State has implemented desegregation decisions in good faith. We have no reason to find that the present course of events will differ in that regard. Absent showings of bad faith or obstruction which are not present here, we see no need for a special master or other monitoring body.

The operation of public schools is traditionally a matter of local concern, and properly so.[186] This Court has intervened only reluctantly in that process, and only for limited purposes. We

183. The Governor's Committee on the Schools Decision, appearing as an amicus, filed a paper on the need for such an agency, and volunteered to serve as the nucleus of such an organization. The Court is also aware that various concerned citizens have begun preparations to assist in efforts to make the implementation of the plan smooth and peaceful.

184. *See generally*, Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 Yale L. J. 1338 (1975), discussing the difficulties of a monitoring commission appointed in Alabama as a result of litigation concerning the operations of a state mental hospital. Wyatt v. Strickney, 344 F. Supp. 373 (M. D. Ala. 1972), *modified sub. nom.*, Wyatt v. Aderholt, 503 F. 2d 1305 (5th Cir. 1974).

185. *See, e.g.*, 14 Del. C. §§ 121, 122, 1058.

186. *See, Milliken*, 418 U. S. at 741-42; San Antonio School District v. Rodriguez, 411 U. S. 1 (1973).

were urged throughout the hearings in this case to be concerned with the "quality of education" offered by the area schools. That is much more properly the concern of local officials and the parents of children in the schools. Our duty here is not to impose quality education even if we could define that term, though we must be conscious that the implementation of the remedy does not defeat the ability of local agencies to fulfill their duty to offer it. We do not find in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), a mandate for District Courts to concern themselves with how well the educative function is performed. The decision in *Brown* was rather that the operation of a dual school system, based on race, is an impermissible classification under the Fourteenth Amendment.[187] There has been much discussion, and there undoubtedly will continue to be much writing upon the topic of whether black children learn better in desegregated classrooms.[188] Our holding does not rest upon those considerations, not least because judges are unqualified and inexpert in answering such questions.[189] Rather, we have found a constitutional violation in the racially suspect treatment of Wilmington during a school district reorganization, and other actions in the past by the State and local authorities. We believe that those violations, upon the implementation of this Opinion, will be remedied. Therefore, we dissolve the three judge panel convened for these purposes. Under the obligation imposed upon the District Court by *Evans* v. *Ennis*, 281 F. 2d 385, 391 n. 1 (3rd Cir. 1960), supervisory jurisdiction will remain in the District Court. Further

187. *See, e.g.*, United States v. Jefferson County Bd. of Educ., 372 F. 2d 836, 871 at n. 76 (5th Cir. 1966); *see generally, Fiss, Racial Imbalance in the Public Schools: the Constitutional Concepts*, 78 Harv. L. Rev. 564, 590-98 (1965); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. Pa. L. Rev. 1 (1959); Read, *The Judicial Evolution of the Law of School Integration since Brown* v. *Board of Education*, 39 Law & Contemp. Prob. 7, 9 at fn. 11 (1975).

188. For a review of the recent literature on the subject, *see* Symposium *The Courts, Social Science and School Desegregation*, 39 Law & Contemp. Prob. 50, *passim* (1975).

189. *Cf., Milliken, supra*, 418 U. S. at 744.



action will be taken, however, only upon the initiation of the parties by proper motion or complaint.

Submit Order.

/s/ JOHN J. GIBBONS,
*Circuit Judge.*

/s/ CALEB M. WRIGHT,
*District Judge.*

LAYTON, *District Judge* (concurring in part and dissenting in part):

The Court has today approved a sweeping plan for the desegregation of the Wilmington School District (Wilmington) which requires the busing of students across school district lines.

For reasons hereinafter expressed, I concur in that part of the majority opinion which requires interdistrict busing, but dissent from the plan proposed by the majority.

In Evans v. Buchanan, 393 F. Supp. 428 (D. Del. 1975), in which I dissented, a majority of this Court declared unconstitutional that portion of the Educational Advancement Act (EAA) which required that the boundaries of the Wilmington School District remain unchanged,* and additionally found, not only that the effect of this act, but also of certain discriminatory practices on the part of the Delaware Real Estate Commission, local housing authorities, etc., tended to lock huge numbers of Blacks within the City, thus contributing to the existence in Wilmington of a school population 84.7% Black and 9.8% White.*

Almost simultaneously with *Evans*, the Supreme Court decided *Milliken* v. *Bradley*, 418 U. S. 717 (1974). In this landmark opinion, the Court stated, *inter alia*, at page 755:

* This Act permitted the State Board of Education to redraw a number of school district boundaries but provided that the lines of the Wilmington School District, a predominantly Black district, should remain as heretofore.

* There are also approximately 800 Hispanic, Oriental and "other" students in the District who make up the remaining 5.5% of the school population.

This is not to say, however, that an interdistrict remedy of the sort approved by the Court of Appeals would not be proper, or even necessary, in other factual situations. Were it to be shown, for example, that state officials had contributed to the separation of the races *by drawing or redrawing school district lines*, see *Haney* v. *County Board of Education of Sevier County*, 429 F.2d 364; cf. *Wright* v. *Council of the City of Emporia*, 407 U. S. 451; *United States* v. *Scotland Neck Board of Education*, 407 U.S. 484; by transfer of school units between districts, *United States* v. *Texas*, 321 F. Supp. 1043, aff'd, 447 F.2d 441; *Turner* v. *Warren County Board of Education*, 313 F. Supp. 380; or by purposeful, racially discriminatory use of state *housing* or zoning laws, then a decree calling for transfer of pupils across district lines might well be appropriate." (Emphasis added.)

A comparison of the language of *Milliken*, just quoted, with the findings of fact and law of the majority of this Court in *Evans*, now affirmed by the Supreme Court, makes it crystal clear that unless the Wilmington schools could be reorganized into a single integrated system, then a Court-ordered plan for the interdistrict busing of Black and White students both into and out of Wilmington should be ordered.

Now, it was obvious at the start that any plan to desegregate Wilmington without interdistrict busing, a "Wilmington Only" plan, was going to be extremely difficult in a city school system that is 84.7% Black, 9.8% White, and 5.5% "other" students. For instance, presently, Elbert Elementary School is 97.6% Black; Stubbs Elementary, 97.6% Black; Drew Elementary, 98.2% Black; Bancroft Middle School, 96.3% Black. Clearly, something more than a mere realignment of the 1,360 White students among the most heavily Black schools would be required. In this connection, Justice Powell in Keyes v. School District No. 1, Denver, Colo., 413 U. S. 189 at 226, and Justice Brennan, in Green v. County School Board, 391 U. S. 430, at 435, made statements which should give some guidance to anyone faced with formulating a plan for the desegregation of a heavily Black city.



At page 226 of *Keyes*, Justice Powell stated:

". . . A system would be integrated in accord with constitutional standards if the responsible authorities had taken appropriate steps to (i) integrate faculties and administration; (ii) scrupulously assure equality of facilities, instruction, and curriculum opportunities throughout the district; (iii) utilize their authority to draw attendance zones to promote integration; and (iv) locate new schools, close old ones, and determine the size and grade categories with this same objective in mind. Where school authorities decide to undertake the transportation of students, this also must be with integrative opportunities in mind."

And at page 435 of *Green*, Justice Brennan wrote for a unanimous Court:

". . . *Racial identification of the system's schools was complete*, extending not just to the composition of student bodies at the two schools but to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities. In short, the State, acting through the local school board and school officials, organized and operated a dual system, part "white" and part "Negro." (Emphasis added.)

But when the "Wilmington Only" plan was presented, it was clear that the State Board had done no more than reshuffle the 1,300-odd White students among the most heavily Black schools in the City.* In fact, it was conceded by counsel for the State Board of Education that the plan had been prepared without reference to the statements from *Keyes* and *Green*, just quoted. Perhaps the State Board felt that because of the unusually heavy imbalance of Black and White students, no satisfactory "Wilmington Only" plan could be devised. In any case, it was not done. And in fairness, I will admit the chances that an acceptable plan could be developed under the circumstances of this case were very remote. Accordingly, I agree with

* Even after this reassignment of White students among Black schools, the latter would remain heavily Black. Thus, Elbert would be 79.8% Black; Stubbs, 86.5% Black; Drew, 75.7% Black; and Bancroft Middle School, 88.1% Black.

the majority that the "Wilmington Only" plan as submitted falls far short of meeting constitutional standards.

Since the "Wilmington Only" plan fails to eliminate the dual system of education in Wilmington, there remains no alternative to a Court-ordered interdistrict busing plan. Various school boards and other groups submitted plans which were analyzed and found wanting by the majority. Nor am I persuaded that any one of these plans presents a satisfactory solution. For a time I was interested in the theory of the so-called "magnet" plan. This plan is based on the premise that if enough attractive courses in various subjects are offered in strategically placed schools through the County, enough Black students would voluntarily elect to be bused out of the City, and enough White students would elect to be bused into the City to desegregate Wilmington on a voluntary basis. The idea is superficially attractive. It would preserve the present separate districts throughout New Castle County. And it would be voluntary in concept. But, if successful, it would require a very large number of students to elect to be transported back and forth from Wilmington in order to desegregate a school district 84.7% Black and 9.8% White. The cost of transportation would be extremely heavy. Furthermore, the Supreme Court of the United States does not favor voluntary plans. Green v. County School Board of New Kent County, 391 U. S. 430 at pages 438-39, and most important, they have been universally unsuccessful where tried. Accordingly, but with regret, I feel there is no hope for a successful future for such a plan in this County.

This brings me to a discussion of the majority plan, which at the stroke of a pen abolishes all existing school districts in the County (except Appoquinimink) and creates one super district of some 80,000 students. It would include, for instance, Newark and New Castle, both small, incorporated cities having a district and separate entity of their own, neither of them contiguous to Wilmington, and each having its own busing



problems to which it does not desire to add those of Wilmington.*

In my judgment, there is no need to abolish nearly every school district in the County to create a workable busing plan. For many years this State has operated its educational program by dividing its school system into relatively small districts. In fact, all the school board witnesses who testified in this case favored the retention in any new plan of a number of small districts. One such member, also a parent, pleaded in favor of their retention. The reason obviously is that in a relatively small district, a very close relationship between parent, teacher and child can be maintained. This plan will inevitably affect that relationship. Perhaps, from a purely administrative point of view, a school system could be operated more efficiently with larger districts. One expert did so testify. But no one, to my knowledge, testified that the educational system, as compared with the administrative process, would suffer because of the operation of the school system through a number of small districts.

Secondly, I believe the majority erred in adopting the County school percentages of 80% White—20% Black as a basis for its ultimate conclusion that in desegregating Northern New Castle County, the percentage of Black students in any one school should not be more than 35% nor less than 10%.

In this connection, it applied a sort of "but-for" test; that is, "but-for" the failure of the housing authorities to build cheap, low-cost housing in the County and "but-for" the EAA which tended to lock large numbers of Black students into Wilmington, the ratio of school children in the Wilmington schools today would be 80% White and 20% Black instead of 9.8% White and 84.7% Black. From this, and allowing a variable factor of 15%, it arrived at the conclusion that in desegregating Northern New Castle County, the number of Black students in any one school should not be less than 10%, nor exceed

* Newark, for instance, buses some 11,773 students daily as a part of its own separate school program.

35%. I simply cannot accept the majority's hypothesis. No testimony was put into the record in support of the conclusion that "but-for" the constitutional violation, Wilmington schools would still be 80% White and 20% Black. No evidence as to the number of available City, as compared with suburban, jobs was adduced. The record contains no predictions as to how many housing units would now be available to Blacks in the suburbs, had the housing authorities presented a vigorous, low-cost housing program. There is no analysis of the transportation available to Blacks who might rent low-cost housing. Nor has the recognized tendency of ethnic groups to live together in certain localities been taken into account. I concede that "but-for" the weak housing program and the unconstitutional feature of the EAA, there would be fewer Blacks today in the City but I doubt if the difference would be substantial, and in any case, there is no evidence indicating how these numbers could be calculated. As I view it, the result drawn by the majority from its "but-for" test represents no more than a bald assumption unsupported by evidence.

My strongest objection to the majority plan is the huge number of students who will have to be bused in order to comply with the requirement that no school, including Wilmington, should have more than 35%, or less than 10%, Black students.

The majority opinion requires that the racial composition of every school in the desegregation area, Northern New Castle County, reflect the racial mix of the desegregation area. Northern New Castle County has a school population of 80,678 students of whom 16,373, or 19.7%, are Black. Thus, the majority's opinion theoretically seeks a 4:1, White to Black, ratio in every school in the desegregation area.

The majority, however, recognizing that it would be impractical to reach a 4:1 ratio in every school in Northern New Castle County, decided that it would consider any school with a 10% to 35% Black enrollment as desegregated. Such flexibility is



required by the fact that all of the Blacks to be bused are located in a relatively small geographical area, in Wilmington and in DeLaWarr, and that several of the nearly all-White schools are located a significant distance from Wilmington and DeLaWarr.

At present, Wilmington has a total school population of 13,852 of whom, 11,733, or 84.7%, are Black. DeLaWarr, a district contiguous with Wilmington, has a total school population of 3,172 of whom 1,740, or 54.9%, are Black. All of the other districts in the desegregation area are more than 90% White.

In estimating the extent of the student shuffling required by the majority's plan, it should be noted that the smaller the number of Black students permitted to remain in the Wilmington and DeLaWarr schools, the greater the number of White students who must be bused in to replace them. Under the majority's plan, the Black enrollment would not be permitted to exceed 35%. Thus, the Black enrollment of these schools must be reduced from 13,473 to 5,958, and the White enrollment must be increased by an equal amount. This would require busing 7,515 Black students out of Wilmington and DeLaWarr and busing into these districts 7,515 White students from the suburbs. Thus, at a *minimum*, the majority plan requires busing 15,030 students for desegregation purposes.*

To summarize, the mandate before this Court is to desegregate the Wilmington schools. The majority instead, and unnecessarily, has desegregated all of New Castle County except Appoquinimink.

In so doing, it has eliminated, unnecessarily, every existing school district in the County except Appoquinimink and established a super district of 80,000 students.

* These figures are not exact because some students live within walking distance of their newly assigned schools and some students presently bused will simply be bused to a different school under the majority's plan.

And, lastly, based upon, I believe, a fallacious premise, it has arrived at an integration formula invoiving the busing of unnecessarily large numbers of students.

In the light of the above criticisms, it may be asked if there is a means by which Wilmington schools can be fairly desegregated on a much more modest scale. I am certain this can be done.

Preliminarily, I think we should look at the evil which enforced busing is required to remedy. In *Brown II*, 347 U. S. at page 494, a unanimous Supreme Court quoted with approval the following language:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."

Segregated schools, then, so it is said, deprive the Black students of their 14th Amendment right to receive "the equal protection of the law." The remedy required to desegregate a given school, according to *Brown II*, is to mix such a proportion of Whites to Blacks as to eliminate any "sense of inferiority" on the part of the Blacks. The difficulty has been that no guidelines as to the proper ratio of Whites to Blacks have ever been established. Accordingly, many lower courts faced with this situation have, in my opinion, for one reason or another, perhaps just to be on the safe side, required the busing of an unnecessarily great number of students. And I think the majority plan results in just that sort of overkill.

If we looked at a given classroom today in the Wilmington schools, we would see 9 Black seats for 1 White seat.* Clearly,

* This is, of course, theoretical in the sense that schools and their classes vary considerably in overall numbers as well as proportions of Black to White. However, the overall proportion of Whites to Blacks in the Wilmington School District is about 9 to 1.



no reasonable person could say that this proportion of Blacks to Whites represents a desegregated school. On this point, this Court is unanimous. Suppose, however, the proportion of Blacks to Whites were reduced to 3 Black seats for each 1 White seat; in other words, that the racial composition of each Wilmington school were reduced to ¾ Black to ¼ White. Could any reasonable person say categorically that a proportion of 1 White to each 3 Blacks did not create an atmosphere in which Blacks could learn without having a sense of inferiority? I believe the average reasonable person would say, "No." And this is particularly so when it is borne in mind that all the cases require that the faculty, staff, personnel, etc., of each school be realigned in the same proportions. Moreover, if it is argued that the proportions here recommended are based on no standard other than that of a reasonable person, I point to the fact not only that the majority's standard is also subject to serious question but in lieu of any other standard, that of the reasonable man, so long a standard of conduct in negligence law, should be acceptable.

If a ratio of ¼ White to ¾ Black were acceptable, as I advocate, then in order to accomplish the suggested racial mix, 2,000 Black students must be bused out of, and 2,000 Whites into, Wilmington.*

The next question is, what is the area to be desegregated? The answer is Wilmington, because Plaintiffs, certain Black children in Wilmington, as well as the Wilmington School Board, have complained that Black children are deprived of equal rights under the rationale of *Brown II, supra*. It is a realignment of the proportion of Whites to Blacks in Wilmington which is prayed for, not that of the surrounding districts which have committed

* These numbers are calculated by seeking a 3:1 Black to White, student ratio. The present Black student population of the Wilmington schools is 11,733 and the present White student population is 1,360. Thus, in order to achieve a 3:1 ratio, the Black student population of the Wilmington schools must be reduced to 9,819. This would require busing 1,914 Black students out of Wilmington and replacing them with an equal number of White suburban students. For ease of discussion, I have rounded the figure up to 2,000.

no act which led to the heavy imbalance of Blacks to Whites in Wilmington. The surrounding districts, or some of them, of sheer necessity will have to receive certain numbers of Blacks from, and bus certain of their White children into, Wilmington. But this is for the purpose of desegregating Wilmington, which is the sole issue before this Court.

If, then, we can proceed under the premise (1) that it is Wilmington which must be desegregated and (2) that some 4,000 students must be bused in order to accomplish this purpose, then the State Board could be directed to prepare a plan requiring the exchange of some 2,000 Blacks from Wilmington with an equal number of Whites from suburban school districts. The attendance areas in Wilmington and the suburban districts which would be selected for this interchange would be left to the State Board, the expertise of which much better qualifies it to devise such a plan than a Court.*

* There is nothing inflexible about the drawing up of a plan provided an acceptable racial mix is maintained both in students as well as faculty, staff and personnel. For instance, and purely as a suggestion, Wilmington could be divided into 4 Zones: A, B, C and D; each zone would be attached to its immediately contiguous school district in the County so that 4 exchange areas would be created: Zone A—Mount Pleasant; Zone B—Alfred I. duPont; Zone C—Alexis I. duPont; Zone D—Conrad. Thus, adapting the school population ratio of the 4 districts to each other (for instance, Alfred I. is 5 times larger than Alexis I), then Mount Pleasant and Zone A would exchange about 300 Whites and Blacks; Alfred I. with Zone B about 1,000; Alexis I. with Zone C about 300; and Conrad with Zone D about 400. On the other hand, the State Board might deem it wiser to spread the burden more equally among a greater number of districts. Moreover, constant experimentation could be carried on. One of the great oppositions to Court-ordered busing is that it tends to destroy the neighborhood school concept. In order to preserve this concept as much as possible, a different 4,000 Whites and Blacks might be bused each year. Nor is it essential to adopt as a basis for this alternative proposal a 3 Black to 1 White ratio. A 2½ Black, or 2, Black, to 1 White ratio might be established. This would, of course, increase the number of children to be bused to 5,000 or 6,000.

If a plan somewhat like the above were adopted, I think it only fair that the State pay all the costs, capital or otherwise, upon the theory that it created the constitutional violation which must be remedied.



This proposal contains, I think, the bare bones of a plan which when fleshed out by experts of the State Board should meet constitutional demands. And in developing such a plan, the State Board should bear the element of cost closely in mind.*

As heretofore stated, I am bound by the authorities to concur with the majority that a plan for the interdistrict busing of students must be ordered. I have merely tried to demonstrate that there is a reasonable alternative, and there may be many alternatives, to the majority plan. The outline here proposed, incomplete as it may appear, would (1) preserve all existing school districts, (2) leave their outstanding bond issues undisturbed, (3) reduce the number of children bused and (4) do away with the necessity of "leveling up" teachers' salaries which, if done, will involve enormous expense. This alternative proposal is far from perfect. No plan will please more than a minority of concerned citizens. Busing 4,000 or 5,000 students will be costly but far less so, I think, than busing a minimum of 15 or more thousand under the majority plan.*

For the reasons expressed, I concur in part and disssent in part.

/s/ CALEB R. LAYTON 2D,
*Senior District Court Judge.*

* It may be argued that cost is irrelevant where constitutional rights are concerned. However, cost is not irrelevant in comparing several plans, any one of which is designed to cure the constitutional violation involved.

* The thing that disturbs me most about the majority plan is that it departs so sharply from the past that, with respect to numbers of students to be bused and the cost, neither the citizens of this County, the State Board of Education nor the Court itself know quite where we are heading.

## APPENDIX C.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action Nos. 1816-1822

BRENDA EVANS, et al.,
*Plaintiffs,*

*v.*

MADELINE BUCHANAN, et al.,
*Defendants.*

### Order.

For the reasons stated in the Court's opinions of March 27, 1975, and July 12, 1974, it is

ORDERED:

1. The Defendant State Board of Education, the individual members thereof, their officers, agents, employees, attorneys and successors, and all those acting in concert or in participation with them, receiving actual notice of this order, be, and they are hereby, mandatorily enjoined to submit to this Court by the 8th day of August, 1975:

(a) a plan to remedy the segregation found by the Court within the present Wilmington School District; and

(b) a plan or plans to remedy the inter-district segregation found by the Court to exist in New Castle County. In preparing any inter-district plan, the De-

fendant State Board of Education is enjoined from relying upon those provisions of the Educational Advancement Act of 1968 found unconstitutional by this Court.

So Ordered This 16th day of April, 1975.

/s/ John J. Gibbons
John J. Gibbons
/s/ Caleb M. Wright
Caleb M. Wright

Judge Layton dissents in conformity with his opinion of March 27, 1975.